88-1317

No. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

CHURCHILL'S SUPER MARKETS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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I.

QUESTION PRESENTED

When the National Labor Relations Board fails to render a final administrative decision for a period exceeding seven years, should a remedial bargaining order be enforced without inquiry into whether the passage of time has sufficiently dissipated the lingering effects of any unfair labor practices such that the preferred remedy of a secret ballot election could be employed?

II.

PARTIES BELOW

Petitioner Churchill's Super Markets, Inc. is an Ohio Corporation that was Respondent before the National Labor Relations Board and Appellant before the United States Court of Appeals for the Sixth Circuit.

Respondent National Labor Relations Board was Appellee before the United States Court of Appeals for the Sixth Circuit.

The United Food & Commercial Workers International Union-AFL-CIO-CLC, Local 954 and 626 was the Charging Party in the administrative proceedings before the National Labor Relations Board.

28.1 STATEMENT

Churchill's Super Markets, Inc. is an Ohio Corporation.

TABLE OF CONTENTS

Question Presented I

Parties Below II

28.1 Statement II

Opinions Below 1

Jurisdiction 2

Statutory Provision Involved 3

Statement of the Case 5

Reasons for Granting Writ 6

Conclusion 11

Appendix:

Decision of the United States Court of Appeals for the Sixth Circuit (September 20, 1988) A1

Order of the United States Court of Appeals for the Sixth Circuit Recalling Mandate (November 9, 1988) A3

Decision of the Administrative Law Judge (August 18, 1981)..... A4

Decision and Order of National Labor Relations Board (July 31, 1987)..... A72

Order of the United States Court of Appeals for the Sixth Circuit (November 9, 1988) A95

Application for Leave to Adduce Additional Evidence (August 1, 1988) A96

Excerpt from Oral Argument of Mr. Joseph Oertel, Esquire, Office of the General Counsel for the National Labor Relations Board, before the Sixth Circuit Court of Appeals on August 5, 1988 in *Churchill's Super Markets, Inc. v. National Labor Relations Board* A110

TABLE OF AUTHORITIES

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) 9

Impact Industries, Inc. v. NLRB, 847 F.2d 379 (7th Cir. 1988) 9,10

Justak Brothers & Co., Inc. v. NLRB, 664 F.2d 1074 (7th Cir. 1981) 9

NLRB v. Berger Storage & Transfer Company, 678 F.2d 679 (7th Cir. 1982) 9

NLRB v. Gissel Packing Company, Inc., 395 U.S. 575 (1969) 5,6,7,11

NLRB v. Katz, 369 U.S. 736 (1962) 8

NLRB v. Koenig Ironworks & Roman Ironworks, 856 F.2d 1 (2d Cir. 1988) 7,8,9

NLRB v. Marion Rohr Corp., 714 F.2d 228 (2d Cir. 1983) 8

NLRB v. Pace Oldsmobile, Inc., 739 F.2d 108 (2d Cir. 1984) 8

Peerless of America, Inc. v. NLRB, 484 F.2d 1108 (7th Cir. 1973) 9

STATUTES

U.S.C., Title 29, Section 160(e) 3,7

No. _____

IN THE

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October Term, 1988

CHURCHILL'S SUPER MARKETS, INC.,
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vs.

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PETITION FOR A WRIT OF CERTIORARI
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For the Sixth Circuit

OPINIONS BELOW

The opinion of the Court of Appeals is unreported as is reflected in 857 F.2d 1474 and appears in the appendix. The opinion of the National Labor Relations Board is reported in 285 NLRB No. 21 (1987) and appears in the appendix. The opinion of the Administrative Law Judge of the National Labor Relations Board is unreported and also appears in the appendix.

JURISDICTION

The final judgment of the Court of Appeals for the Sixth Circuit was entered on November 21, 1988 and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 10(e) of the National Labor Relations Act, Title 29 U.S.C. Section 160(e).

29 U.S.C. 160

* * * * *

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional

evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Judicial Circuit has enforced an order of the National Labor Relations Board (hereinafter "Board") requiring petitioner, Churchill's Super Markets, Inc., to recognize and bargain with a union which at one time sought to represent its employees although no election was ever held. Underlying this bargaining order is the Board's conclusion that certain unfair labor practices, the last of which occurred on March 26, 1980, continue to make a fair secret ballot election among the company's employees impossible. The Board's order was entered on July 31, 1987, more than seven years after the commission of what the Board concluded were unfair labor practices. For fully six of those years, the parties waited while the Board itself pondered its decision. Petitioner contends that the passage of so extraordinary a length of time is contrary to the doctrine of *NLRB v. Gissel Packing Company, Inc.*, 395 U.S. 575 (1969), and that there exists a split among the circuit courts concerning enforcement of bargaining orders in these circumstances.

REASONS FOR GRANTING WRIT

The principle established by this Court in *NLRB v. Gissel Packing Company, Inc.*, is that the preferred method of testing employee sentiment regarding unionization is a secret ballot election. *Id.* at 596. The Board may enter a bargaining order in cases where employer unfair labor practices "have the tendency to undermine majority strength and impede the election process" but only if:

> The Board finds that the possibility of erasing the effects of past practices and insuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . . *Id.* at 614-15.

To support its remedial bargaining order in the present case, the Board recited the formula language denying the possibility of a fair secret ballot election while dismissing the passage of an unprecedented amount of time. At oral argument, counsel for the National Labor Relations Board admitted that the present case is probably the longest in which the Board has ever delayed decision. It is a case, he said, which "fell between the cracks".[1] Yet the preferred remedy of an employee secret ballot election was accorded only lip service by the Board.

Moreover, normal employee turnover at the Company's warehouse has resulted in the departure of every voting employee present at the time of the 1980 unfair labor practices (Affidavit of Robert J. Carr, III, App. 108). The Board refused to reconsider its decision in

[1] Excerpt from oral argument of Mr. Joseph Oertel, Esq., Office of the General Counsel for the NLRB, App. 110-11.

light of this fact and the Court of Appeals chose not to rule on petitioner's application for leave to adduce additional evidence under Section 10(e) of the National Labor Relations Act, 29 U.S.O. Section 160(e). (Appendix, p. A96).[2]

The extraordinary passage of time and the complete turnover of the employee complement indicts the Board's application of the *Gissel* doctrine. A fair secret ballot election is the preferred method of testing employee sentiment and the Board's superficial analysis is not sufficient to sustain its findings given the circumstances present in this case. The decision of the Board and the Sixth Circuit Court of Appeals conflicts with this Court's decision in *NLRB v. Gissel Packing Company.*[3]

Contrary to the Sixth Circuit Court of Appeals, the Second and Seventh Circuits have refused to enforce bargaining orders entered by the Board even when the Board has rendered its decision more promptly than in the present case. In *NLRB v. Koenig Ironworks & Roman Ironworks,* 856 F.2d 1 (2d Cir. 1988), the employer and the Ironworkers union had been parties to collective bargaining agreements. When the final agreement expired in 1975, the employer signed a collective bargaining agreement with the Teamsters union. Remedial orders were entered by the Board in 1979, 1980 and 1985 including at least two bargaining

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[2] The Sixth Circuit entered no order specifically addressing the Section 10(e) motion and it was implicitly denied by the Court's order enforcing the Board's decision.

[3] While it would not excuse the Board's excessive delay in deciding this matter, it is noteworthy that the employer in this case did not commence its appeal merely to affect delay. The petitioner succeeded, through the administrative process, in winning the dismissal of about 75% of the charges which were filed against it in 1980.

orders.[4] *Id.* It is significant to note, however, that the Board order which was before the Second Circuit in the 1988 case was founded on unfair labor practices committed in 1985, a lapse of only three years. *Id.* at 2.

In analyzing the facts before it, the *Koenig Iron Works* court noted the distinction between cases in which a union's majority status has been ascertained in an election and those in which no election has been held (e.g. the present case). Citing this Court's decision in *NLRB v. Katz,* 369 U.S. 736 (1962), which rests on the principal that majority status, established in an election, is entitled to particular weight, the court continued by noting, "where a union's majority status has not been ascertained by a valid election, we have on occasion declined to enforce bargaining orders." *Id.* at 3.[5] The court then pointed out that these cases in which "majority status had never been validly ascertained" are distinguishable from cases in which either an election has been held (e.g. *NLRB v. Katz, supra*) or voluntary recognition has been extended (as in the *Koenig Iron Works* case then before the court.) The conclusion the court reached is that "The Board's authority to order bargaining after an extended time period is at some point circumscribed where majority status has not determined by election." 856 F.2d at 3.

The *Koenig Iron Works* court held that the passage of time from the expiration of the last collective bargaining agreement between the parties and "The company's ... considerable basis for doubting the current majority status" of the union made it

[4] The 1979 and 1980 orders were enforced by the Second Circuit Court of Appeals and the employer resumed negotiations with the Ironworkers.

[5] Citing *NLRB v. Pace Oldsmobile, Inc.,* 739 F.2d 108 (2d Cir. 1984), and *NLRB v. Marion Rohr Corp.,* 714 F.2d 228 (2d Cir. 1983).

unreasonable to enforce the Board's order and indulge in a continuing presumption of majority status. It is important to note that in the *Koenig Iron Works* case numerous Board orders had been entered in the twelve year period from expiration of the last collective bargaining agreement. While the unions at one time enjoyed the presumption of majority status and the employers were certainly responsible for a significant portion of the delay, the Court nonetheless refused to enforce the final bargaining order. In the case before this Court, the nine year delay which has occurred is not the "fault" of petitioner and only one Board order has been sought or entered. Also, union majority support has never been established by an election, which places the present case well within the realm of those in which Board delay must result in denial of enforcement of a bargaining order. *Id.* at 4.[6]

Similarly, the Seventh Circuit in *Impact Industries, Inc. v. NLRB*, 847 F.2d 379 (7th Cir. 1988), denied enforcement of a Board bargaining order after a seven year delay and turnover of a majority of the employer's workforce. While acknowledging that it is within the province of the Board to enter bargaining orders, the Court stated its requirement that the Board make:

> "Specific findings" as to the immediate and residual impact of unfair labor practices on the election process . . . and a "detailed analysis" assessing the possibility of holding a fair election in terms of any continuing effect of misconduct . . . and the potential effectiveness of ordinary remedies.[7]

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[6] *See, Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

[7] *Id.* at 382; citing *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1118 (7th Cir. 1973); *see also NLRB v. Berger Storage & Transfer Company*, 678 F.2d 679 (7th Cir. 1982), *Justak Brothers & Co., Inc. v. NLRB*, 664 F.2d 1074 (7th Cir. 1981).

The court concluded that "If a fair and impartial election can be conducted ... a bargaining order is unnecessary. To grant a bargaining order in any instance other than in the last resort (when other traditional remedies are available) constitutes an abuse of the Board's discretion." *Id.* at 383. Prominent among the factors which the court in *Impact Industries, Inc. v. NLRB* cited as warranting further consideration by the Board was the passage of seven and one half years from the commission of the unfair labor practices which gave rise to the case. Accordingly, the Seventh Circuit remanded to the Board for further consideration.

Impact Industries could well be the twin of the present case. The unfair labor practices were committed in April and May of 1980, only a month or two after the unfair labor practices found in the present case and the Board's decision was entered on July 30, 1987, one day before the Board's order was entered in this case. The passage of so long a period of time must, per se, require reconsideration by the Board to determine whether lingering effects of unfair labor practices still haunt the workplace. The Second and Seventh Circuits have recognized that the passage of long periods of time during the administrative process may well create the likelihood that traditional Board remedies would easily suffice to allow the preferred secret ballot election.

CONCLUSION

For reasons known only to itself, the Board allowed seven and one half years to pass in this case before it entered its final administrative decision. That decision sought to impose a bargaining order not only on petitioner but also upon its current employees, none of whom were present when the alleged unfair conduct occurred in 1980. The world is a far different place than it was nine years ago and for the Board and the Court of Appeals to conclude, without further inquiry, that a lingering taint of unfair labor practices prevents a fair secret ballot election contradicts the dictate of *NLRB v. Gissel Packing Company* and creates a split among the Circuit Courts of Appeals. For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed September 20, 1988)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

NO. 87-6064

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHURCHILL'S SUPER MARKETS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

BEFORE: KEITH, KENNEDY and NORRIS, *Circuit Judges.*

PER CURIAM: Petitioner, Churchill's Super Markets, Inc., seeks review of an order of the National Labor Relations Board (the "Board") finding it in violation of §10(f) of the National Labor Relations Act, as amended, 29 U.S.C. §160(f). The Board filed a cross-application for enforcement of its order pursuant to §10(e) of the Act.

After hearing arguments of counsel, and after careful review of the briefs and record on appeal, we conclude that the Board was correct in finding that the company violated §8(a)(1), (3) and (5) of the Act. Even though there had been a seven year delay on the part of the Board between the time of the violations and its decision, the Board was entitled to find that the taint of the serious illegal acts of the employer may still linger at the company's produce warehouse, the place where the union activity began. *See, e.g., NLRB v. Katz,* 369 U.S. 736, 748 n.16 (1962). Accordingly, for the reasons set forth in its decision of July 31, 1987, we enforce the Board's order to bargain and deny the petition for review.

ALAN E. NORRIS, *Circuit Judge,* dissenting. I am unable to say that the Administrative Law Judge was not warranted in drawing the conclusion that exceptional circumstances were then present to justify the extraordinary remedy of ordering the parties to proceed directly to bargaining, thereby by-passing the normal, preferred remedy of an election. However, I would hold that the Board abused its discretion when, after having delayed the matter for seven years, it concluded that the extraordinary remedy was still required, without having conducted any factual inquiry as to whether conditions still existed to require that order to the exclusion of the preferred remedy. *See, e.g., Clark's Gamble Corp. v. NLRB,* 422 F.2d 845 (6th Cir.), *cert. denied,* 400 U.S. 868 (1970).

It seems to me that the practical effect of the holding of the majority is that the negative effects of outrageous conduct can never be said to have dissipated by reason of the passage of time, so that an election can be ordered.

MANDATE ISSUED: 11/21/88

COSTS TAXED: $178.50
(to be recovered by respondent)

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT RECALLING MANDATE

(Filed November 9, 1988)

Case No. 87-6064

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHURCHILL'S SUPER MARKETS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

The Court having determined that the mandate in the above-styled cause was inadvertently issued,

It is ORDERED that the mandate be and hereby is recalled.

ENTERED PURSUANT TO RULE 8(b)
RULES OF THE SIXTH CIRCUIT

/s/ LEONARD GREEN, *Clerk*

DECISION OF THE ADMINISTRATIVE LAW JUDGE

(Dated August 18, 1981)

Case Nos. 8-CA-13,944-1,
8-CA-13,944-2, and
8-CA-14,243-1
(Consolidated)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

CHURCHILL'S SUPERMARKETS, INC.,

and

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO-CLC,
LOCAL 954 AND 626.

Mark F. Neubecker, Esq., of
Cleveland, OH, for the
General Counsel.
Justice G. Johnson, Jr., Esq.,
John G. Mattimoe, Esq., and
Terrance L. Ryan, Esq., of
Toledo, OH for the Respondent.

DECISION

I. Findings of Fact

A. *Statement of the Case*

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before the undersigned at Toledo, Ohio, upon a consolidated unfair labor practice complaint[1], issued by the Director of the Board's 8th Region, which alleges that Respondent Churchill's Supermarkets, Inc.,[2] violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the Amended Consolidated Complaint alleges that the Respondent both promised and granted benefits to employees in order to persuade them not to support the Union, coercively interrogated employees concerning their union sympathies, threatened employees with loss of benefits, loss of overtime, and more onerous working conditions in

[1] The principal docket entries in this case are as follows:

Charge filed herein by Locals 945 and 626, United Food & Commercial Workers International Union, AFL-CIO-CLC (herein called Union) against Respondent in Case No. 8-CA-13,944-1 on June 23, 1980; Charged filed herein by Union against Respondent in Case No. 8-CA-13,944-2 on June 23, 1980; Amended Charged filed by Union against Respondent in Case No. 8-CA-13,944-2 on June 27, 1980; Charge filed herein by Union against Respondent in Case No. 8-CA-14,243 in September 24, 1980; Original Consolidated Complaint issued on August 29, 1980; Respondent's Answer filed on September 11, 1980; Amended Consolidated Complaint issued on November 28, 1980; Respondent's Answer filed on December 11, 1980; Hearing held in Toledo, Ohio, on April 27-30, 1981; Briefs filed with the undersigned by the General Counsel and the Respondent on or before July 30, 1981.

[2] Respondent admits, and I find, that it is an Ohio Corporation which maintains its principal office in Sylvania, Ohio, and operates a chain of supermarkets in and about Toledo, Ohio. In the course and conduct of this business, the Respondent annually derives gross revenues in excess of $500,000 and receives at its Toledo, Ohio, locations directly from points and places located outside the State of Ohio goods and merchandise valued in excess of $50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), 2(6), and 2(7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

reprisal for supporting the Union, created the impression among employees that their union activities were subject to company surveillance, solicited and remedied grievances in order to persuade employees not to join the Union, and imposed upon employees an unlawful no-solicitation rule. Said Amended Complaint also alleges that the Respondent discriminatorily discharged Rebecca Donnelly, Richard Doll, and William Winans, reduced the normal overtime of other employees, and refused to grant a leave of absence to another employee in reprisal for their union activities. The Complaint also alleges an unlawful refusal to bargain in one of the bargaining units which the Union tried to organize[3] and seeks a *Gissel* remedy with respect to that unit.[4] The Respondent denies the commission of independent violations of the Act and contends that the discharged individuals who were named in the Amended Complaint were terminated for cause. It also asserts that a representation election is the proper means of determining who is the proper bargaining agent at its warehouse. Upon these contentions, the issues herein were joined.[5]

[3] In the spring of 1980, the Respondent filed representation petitions seeking separate elections at the Respondent's downtown Toledo warehouse and in three of its four retail stores, known as the Monroe Street, Central Avenue, and Alexis Road stores. (Case Nos. 8-RC-12,108; 12,109; 12,110; and 12,118). No petition was ever filed for its Byrne Road store. A decision and direction of separate elections in each of these units was issued by the Director, Region 8, on April 11, 1980, but the elections have been blocked because of the pendency of the charges in this consolidated case.

[4] *N.L.R.B. v. Gissel Packing Company*, 395 U.S. 575 (1969).

[5] The transcript herein is hereby corrected as follows:

1. On page 9, line 9, delete the word "cannot".
2. On page 17, line 16, change "customer" to "customary".
3. On page 339, line 17, and on 324, line 17, change "folly" to "fully". Respondent filed an unopposed post-trial motion to admit its Employee Handbook into evidence as Respondent's Exhibit No. 21. The motion is granted and the exhibit is received.

B. The Unfair Labor Practices Alleged

Respondent operates four supermarkets and a produce warehouse in and about Toledo, Ohio. The stores bear the name of the Company President and Chief Executive Officer, General Walter A. Churchill, Sr. Respondent's Executive Senior Vice-President and Director of Operations is Richard Geerken. Respondent employs about 600 full-time and part-time employees, including about fifty supervisory or managerial employees. Its employees have never been represented by any labor organization.

In the fall of 1979, when the Respondent opened its Alexis Road store, the Union herein engaged in sporadic informational picketing. However, the actual organizing of this store and other parts of the Respondent's business did not begin until about January, 1980. The five employees who constituted the warehouse unit signed designation cards on or before February 4, 1980. Several union meetings where held about this time for the purpose of signing up Respondent's employees and word reached various members of the Respondent's management, either directly from unionized employees or "via the grapevine" that this effort was in progress.

1. Events at the Respondent's Warehouse

One of the first overt acts of employee union activity was the handbilling of the Central Avenue store on February 19 by warehouse employees Richard Doll and Keith Mallory. Word of this activity was telephoned to Ron Shook, the Produce Buyer and supervisor in charge of the warehouse, by the manager of the Central Avenue store. Shook was upset and brought the matter immediately to the attention of Judy Faust, the Warehouse Manager and his assistant. They held a

meeting of employees the following day at the warehouse to discuss this turn of events. Shook told employees on this occasion that he had been under the impression that the warehouse employees were a big happy family and asked Mallory and Doll what was their problem. Both replied that they wanted some representation. Shook said they should have settled their problems without third-party intervention. An open discussion ensued. One employee stated that they all wanted additional benefits and job security. Employee Charles Tucker complained that he had worked sufficient hours to qualify as a full-time employee and was entitled to health insurance and other benefits which went with full-time employment.[6] However, he was not receiving them. Mrs. Faust replied that the Company had too many full-time people so he could not get hospitalization. Both Shook and Faust told employees that they were very disappointed in their actions. Shook also said on this occasion that, if the Union came in, he would close the warehouse[7], employees would be out of jobs, and they would be ineligible for unemployment compensation.

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[6] According to the Respondent's Employee Handbook, an employee who averages 32 hours or more per week for 13 consecutive weeks is considered to be a full-time employee and, as such, is entitled to health insurance coverage and presumably other benefits.

[7] The warehouse is located in a deteriorated section of downtown Toledo. Shook testified that he told employees that a real estate agent had been sent around to appraise the building for the purpose of putting it on the market because the Respondent did not really need the produce warehouse in order to service its stores. As of the date of the hearing, some fourteen months after these remarks were made, the warehouse continues to operate because the Respondent could not find a buyer for the building.

A few days later, Geerken visited the warehouse and another discussion session with employees was held in the presence of Geerken, Shook, and Mrs. Faust. One complaint that arose at this time was that the warehouse employees had no fixed hours for breaks or lunch. Most of them arrived for work between 3:30 a.m. and 5 a.m. and often worked straight through without any break until the work was completed and they were ready to go home. A few days later, Geerken instructed Mrs. Faust to post stated break and lunch periods for all warehouse employees. After this was done, all employees took breaks or lunch at the times set forth after their respective names. On this occasion Tucker reiterated his complaint about being eligible for health insurance benefits as a full-time employee and stated that he had previously voiced this complaint to no avail. Geerken said he would check into the problem. During the course of the discussion, Geerken was heard to say that the Respondent could not afford a retirement program, with or without a union. Shortly thereafter, Tucker was classified as a full-time employee and was accorded health insurance benefits.

Tucker, who had signed a union card in late January and who had also engaged in handbilling of the Central Avenue and Monroe Street stores on behalf of the Union, testified that his hours were cut in mid-April. He worked a fluctuating schedule of hours each week. His time cards for an eight-month period from late 1979 to mid-1980 reflect the following hours worked:

Period Ending —	*Hours Worked (fractions omitted)*	*Period Ending —*	*Hours Worked*
12/28/79	30	3/23/80	37
1/ 4/80	32	3/30/80	37
1/11/80	40	4/ 6/80	41
1/18/80	41	4/13/80	38
1/25/80	37	4/20/80	35
2/ 3/80	44	4/27/80	40
2/10/80	45	5/ 4/80	32
2/17/80	45	5/11/80	36
2/24/80	39	5/18/80	37
3/ 2/80	40	5/25/80	37
3/ 9/80	43	6/ 1/80	vacation
3/16/80	36	6/ 8/80	40
6/15/80	39	7/27/80	47
6/22/80	45	8/ 3/80	37
6/29/80	42	8/11/80	41
7/ 6/80	44	8/17/80	40
7/13/80	40	8/24/80	47
7/20/80	52		

Sometime in March, Tucker asked Mrs. Faust why his hours were being reduced. She gave him no answer. Later, he asked to have his timecards and was told that they were not available.

On March 10, Eugene H. Kolkman, the Union's Chief Executive Officer, wrote a letter to Shook advising Shook that the Union represented a majority of the warehouse employees. He made a demand for recognition and offered to display the authorization cards in his possession to a neutral party for verification. On March 12, Respondent's counsel replied to Kolkman's letter and insisted on a Board election to determine the Union's majority status. On the same day, Churchill sent a letter

to all employees, both at the warehouse and at the retail stores, informing them that the Union had filed representation petitions for the warehouse and the Monroe Street and Alexis Road stores. The letter went on to say that the Respondent did not believe it to be in the best interest of the employees to select the Union as their bargaining agent and expressed the opinion that whatever problems might arise could be worked out "among ourselves on a fair and honest basis" without interference from an outside Union.

Richard Doll began working at the warehouse in June, 1978. He performed a variety of jobs. He inspected incoming deliveries of produce, drove a fork lift and handjack, inventoried produce, and made pick-ups and deliveries from the warehouse to the Respondent's stores. As long as Doll worked for the Respondent it was well known that he had a habit of drinking considerable quantities of beer. Occasionally, he would come to work smelling of beer and this condition did not escape the notice of his supervisors. On one occasion, Shook asked employee Mallory if Doll carried a bottle on his person. Mallory replied that he did not do so. Occasionally farmers visiting the warehouse to sell produce reported that Doll was smelling of alcohol.

Over the course of two years, Doll had a number of small accidents with equipment. On one occasion, he backed a truck into a dumpster. On another occasion, when operating a fork lift, he dumped over a load of tomatoes. On a third occasion, he ran an electric pallet jack on his foot. In the fall of 1979, while backing a truck at the Byrne Road store, he rammed the loading dock. The store manager reported this incident to Shook with the further information that he had smelled alcohol on Doll's breath.

From time to time, warehouse employees and supervisors ate lunch together at a nearby bar called the Roadhouse. I credit testimony that Doll and others would have beer with their lunch on these occasions, and I also credit record testimony that, on some of these occasions, Doll and others returned to the warehouse after lunch to continue to work. In the winter of 1979-80, Shook spoke to Doll about his drinking and told him he would have to learn to control it. This occurred after Doll's wife called Shook's home to inquire about Doll's whereabouts when he failed to come home after work.[8]

In late March, 1980, after the Respondent had instituted the policy of granting fixed lunch periods to warehouse employees, Geerken visited the warehouse and began to discuss Doll's habits with Shook and Mrs. Faust. Geerken told them that, before any disciplinary action could be taken against Doll, clear proof had to be obtained that he was drinking. Mrs. Faust volunteered to visit the nearby Roadhouse Bar, where Doll had gone on his lunch hour[9], to find out if he was drinking. She did so and saw Doll having a beer. When she reported the information to Shook, the latter called the bar, spoke to a waitress, and learned that Doll had two or three beers but had not ordered anything to eat. When Doll returned to the warehouse, he was assigned to some inventory work.

Shook wrote up a disciplinary slip on Doll, dated March 26. It stated that he had given Doll a three-day suspension for drinking while on dinner hour and returning back to work. He told Doll that he was

[8] The record contains undisputed evidence that, during a trip to Toledo from Detroit where Doll had gone to pick up a load of pineapples, he had a breakdown and had to call Shook and Mrs. Faust to pick him up. During the return trip in Mrs. Faust's vehicle, she offered Doll a beer and he drank one.

[9] Because Doll reported to work at 3:30 a.m., he normally took his lunch hour beginning at 9:30 a.m.

suspended and phoned Geerken to say that the disciplinary slip was in the mail to Respondent's corporate headquarters. A day or so later, Geerken phoned Shook and instructed him to discharge Doll for violating a provision of the Respondent's personnel handbook which makes working after using drugs or alcoholic beverages a serious offense.

2. Events at the Monroe Street Store

The Monroe Street store is the largest of the Respondent's retail outlets. It contains a variety of departments, including a flower shop, a hardware store, and a coffee shop, as well as grocery and meat departments. Some of its sections are open on a 24-hour basis. The Respondent also maintains its corporate office at this location.

There is record testimony from various employees that, after the Union began its drive in January 1980, various supervisors responded to counteract the effect of the organizing campaign. Short-term employee Joseph Wielgopolski testified without contradiction that, sometime in March, Richard Glauser, the Flower Shop Manager[10], took him aside for a private conversation in the bathroom at the store. Glauser reportedly asked Wielgopolski what he thought of the Union, to which the latter replied that he did not think much of it. Then Glauser went on to ask other questions about the Union and threatened that there would be layoffs in the event of unionization. He told Wielgopolski that there would be

[10] Glauser testified that he had no recollection of the conversation recounted by Wielgopolski and had no recollection even of Wielgopolski as an employee.

a strike because the Respondent would not give the Union a contract. He predicted violence and said that a lot of people would be fired.

Wielgopolski was a carry-out employee, which meant that he had a variety of menial jobs including the loading of customer cars. He testified that he had signed a card and had attempted to sign up other employees in the store in the presence of, or in the immediate vicinity of, several supervisors. He complained that, for a two week period of time, he was assigned exclusively to loading groceries in customer cars in the pickup area and was thereby isolated from other employees. He later returned to other duties and is no longer employed by the Respondent.

Gus Wingler is a produce clerk. He attended a Union meeting on January 28, 1980, at the Sheraton-Westgate Motel. On the following day, he was engaged in a conversation at the store with a fellow employee who inquired into the particulars of the meeting. At this point the bakery supervisor and Wingler's own supervisor, Brent Langenfelder, joined the conversation. Langenfelder asked Wingler if he attended, how large the meeting was, and what he thought of it. Wingler replied that about 50 employees attended and he thought the meeting went all right. He added that if Rick (Carr), General (Churchill), or Tom Dembowski (the Monroe Street Store Manager) did not get off his back, he would go all out for the Union. Langenfelder replied that he was sorry to hear this because there were two sides to every story. Wingler said that, as of that time, he had heard only one side.

As discussed more fully hereinafter, Monroe Street employee Rebecca (Becky) Donnelly was terminated on February 18. Shortly thereafter, Wingler and fellow

employee Kay Miller were discussing the discharge at the store in the presence of Langenfelder. Mrs. Miller stated that the Union representatives took Miss Donnelly to Food Town (a unionized store) and got her a job there. I credit Wingler's statement that Langenfelder then said, "Good. In a couple of weeks, I hope they can find a lot of jobs." Wingler became upset and, shortly thereafter, spoke with Dembowski, who is Langenfelder's superior. He told Dembowski in an excited manner that he need more money and had attended a union meeting, adding "You guys don't even have to wait two weeks. You can fire me now." Dembowski tried to calm Wingler, invited him to have a cup of coffee with him, and spoke to him in order to allay his fears. During the course of this coffee break, Dembowski assured him that the Company had no intention of discharging him.

Meat Department employee Clyde Nebb has been employed at the Monroe Street store about eight years. On January 29, 1980, he signed a union card and thereafter made no secret of his union sympathies in the course of various discussions with his supervisor, Meat Manager Jack Pieh. On one occasion in late January, Pieh asked Nebb how many people had showed up at a Union meeting. Nebb's reply was, "A lot more than expected."

Respondent maintains outgoing phone lines at various locations in its stores and has been quite liberal in permitting employees to use the phones for personal matters. The overriding consideration has always been that an employee should not tie up the phone lines for conversations of a personal nature. On one occasion, Nebb phoned the Byrne Road store and spoke with a meatcutter at that location to tell him about a forthcoming union meeting and to ask him if any

meatcutters at that location were interested in joining. Pieh got word of this phone call from Gary Jones, the Meat Manager at the Byrne Road store, and spoke to Nebb about it. Pieh told Nebb that such use of the phone was considered to be soliciting on Company time and using Company property in violation of Company policy and instructed him not to use the phone for Union business, even on his own time, since it was Company property. Pieh also said he was going to go "by the book" with regard to improper solicitations, meaning a verbal warning for the first offense, a written warning for the second offense, time off for the third offense, and discharge thereafter. Nebb assured Pieh that he would not do so in the future, and asked Pieh when it was permissible to solicit for the Union. Pieh said he would find out and tell him.

Several days later, Pieh told Nebb, after repeated requests for clarification, that he could solicit for the Union if he had punched out on a break or at lunch time, so long as the employees being solicited were also punched out. He also said he would have to confine his soliciting to non-productive work areas. Nebb testified that this was the first time he had ever heard of this policy.[11]

On another occasion, Langenfelder was discussing the organizing drive with Pieh in the presence of Nebb and asked Pieh how many employees had attended a

[11] In the Respondent's Employee Handbook, there is a provision which states "Solicitations on behalf of any club, society, labor union, religious organization, political party, or similar association is not permitted during hours that employees are working. This prohibition covers solicitations in any form either for membership, subscription, or payment of money. Outsiders and other employees are prohibited from soliciting employees during hours that employees are working and while they are on Company premises."

recent union meeting. Pieh pointed to Nebb and told Langenfelder to ask Nebb because Nebb was one of the leaders.[12] A few days later, Pieh asked Nebb directly how many of his people were getting involved in the Union effort and how many had attended a Union meeting. Nebb made no reply. In the course of another of their conversations concerning the Union drive, Nebb asked Pieh who was the source of his information concerning the Union effort. Pieh's reply was that the Company had a pipeline the same as the Union did.

On one occasion, Langenfelder asked Nebb if any of "his people" (in the Produce Department) were showing up at Union meetings. Nebb refused to reply. I credit Nebb's testimony that, in mid-February, as Nebb was getting ready to go on vacation, Pieh asked him in the presence of other employees whether the Union was picking up the tab for his vacation trip. Nebb asked Pieh what prompted that thought, and Pieh replied that he had heard that unions sometimes offer vacations, cars, and money to people to help them organize. He voiced the opinion that since the Union had been trying for so long to get in at Churchill's, it would be worth their while if they could find someone to "bust Churchill's open."

Late in February, 1980, a day or so after a Union meeting, Pieh told Nebb that he knew who had attended the meeting and from which stores they had come. Pieh also said to employee Dewayne Bell that he heard that Bell had attended. Bell became upset at this remark and insisted that Pieh produce the person who had made the statement so he could confront him. Bell insisted to Pieh

[12] In his testimony, Pieh said that Nebb had never admitted having been a member of the Organizing Committee. However, Pieh assumed that Nebb was one of the main organizers because of the feedback he had been receiving.

that he had not attended the meetings. Pieh finally relented, admitting that he had not actually received any such information but had just made up the statement in order to get Bell to admit if he had been doing anything.

In March, 1980, Pieh gave Nebb his annual employee evaluation. During the course of this discussion, which was held in the conference room at the Monroe Street store, Pieh asked Nebb if he had any gripes. Nebb replied that he had the same ones he had mentioned in previous years—lack of a retirement plan, wages which were below union scale, and inadequate benefits, particularly health insurance. He complained to Pieh that employees were required to pay for dependent health insurance coverage out of their own pockets. Nebb also complained that, as assistant manager, he was making only $.10 per hour more than journeyman meatcutters, whereas in union stores assistant managers made $.30 or $.40 more per hour than journeymen. Pieh asked Nebb why he was getting involved with the Union and why he would become one of the leaders in its organizing effort. Nebb replied that he saw no other way of getting a proper pay scale or of obtaining a retirement system. Pieh said that, because an organizing drive was in progress, there was nothing he could do about a wage differential for assistant managers but it was definitely something that should be looked into and, after the "union business" was over, the Company could do something. I credit testimony to the effect that Pieh also said that it was going to be a shocker when "the old man" (General Churchill) saw list of Union leaders with Nebb's name at the top. Nebb asked what list he was referring to and Pieh replied it was not hard to sit down and put one together since people were actively passing out buttons and literature.

Nebb testified that, in previous years, he had received an average of about two hours a week of overtime. Overtime was not customarily spread throughout the calendar year but occurred in large amounts at specific intervals, namely during holidays and when the meat manager was on vacation and Nebb temporarily substituted for him. In June, 1980, Pieh was shifted to the Alexis Road store and the meat manager at that store, Vern Viers, came to Monroe Street. Time cards placed in evidence show the following numbers of hours worked each week in 1980 and into 1981 by Nebb:

Week Ending	*Hours Worked*	*Week Ending*	*Hours Worked*
1/12/80	41	8/9/80	40
1/19/80	41	8/16/80	40
1/26/80	41	8/23/80	40
2/2/80	40	8/30/80	42
2/9/80	40	9/6/80	40
2/16/80	43	9/13/80	40
2/23/80	43	9/20/80	40
3/1/80	39	9/27/80	42
3/8/80	50	10/4/80	41
3/15/80	41	10/11/80	40
3/22/80	39	10/18/80	40
3/29/80	40	10/25/80	38
4/5/80	40	11/1/80	39
4/12/80	?	11/8/80	39
4/19/80	40	11/15/80	40
4/26/80	40	11/22/80	40
5/3/80	41	11/29/80	37
5/10/80	42	12/6/80	40
5/17/80	41	12/13/80	40
5/24/80	45	12/20/80	40
5/30/80	32	12/27/80	35
6/7/80	holiday	1/3/81	32
6/14/80	40	1/10/81	40
6/21/80	vacation	1/16/81	40
6/28/80	37	1/23/81	leave
7/5/80	32	1/31/81	40
7/12/80	40	2/7/81	40
7/19/80	50	2/14/81	leave
7/26/80	40	2/21/81	?
8/2/80	40	2/28/81	?

The above-recited figures indicate that, during the first 20 weeks of 1980 for which legible time cards for a full week can be found in the record, Nebb averaged 40.9 hours per week. During the next 34 weeks for which legible time cards for a full week can be found in the record, he averaged 39.5 hours, a difference of 1.4 hours per week. During the latter part of 1980, Gary Jones, the Manager of the Byrne Road store, came to work one day a week in the Monroe Street Meat Department. Occasionally another employee from the same store filled in at Monroe Street. The net result of their presence at Monroe Street meant fewer hours for the Monroe Street Meat Department employees.

Penelope Shultz, a deli clerk at the Monroe Street store, was an active union supporter. One of her efforts was the composition and mailing of a two-page letter to all employees urging them to support the Union. About 400 copies of this letter were mailed with the assistance of the Union. After the letter became circulated, Jack Pieh asked her where she got the figures in the letter which stated that the Company had made $6.4 million dollars in profit.[12] She replied that she had obtained the information from her stockbroker. I credit Miss Shultz' testimony to the effect that, on one occasion, she witnessed a conversation between Deli Manager Shirley Yeupell and deceased employee Yvonne Day in which Mrs. Yeupell handed Mrs. Day a "Vote No" button which was lying on a table in the Deli Section and asked Mrs. Day if she cared to wear one. The latter replied that she would do so.

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[12] In the text of the letter, Miss Shultz stated:

> "I wrote this letter alone. It contains my own ideas and opinions and conclusions. This letter will be signed with my name. I stand behind what I have written and I do not mind being questioned or confronted about it."

It was customary for the Respondent to hold an annual picnic in the late summer or early fall for the benefit of employees, their families, and friends. The normal charge was $1, payable at the door, to cover the cost of fried chicken and other food which was provided. In 1980, the picnic was held but advance purchase of tickets was required. In addition to making a request for tickets, an employee had to list the names of the guests he or she wished to invite. Both Mrs. Shultz and employee Sheila Lemble turned in the names of various Union representatives as their guests at the picnic. When the tickets were not forthcoming in the usual course of distribution, Miss Lemble went to see Dombowski to ask what had become of her tickets. Dombowski told Miss Lemble that the names of her prospective guests had been brought to his attention and that it included Union representatives. He also told her that they were not welcome "because of their involvement with Central Avenue." She then asked about former employee Joe Wielgopolski. He replied that he was also unwelcome but offered to let her buy a ticket for herself. She told him to forget it.

Christine Curtis is a waitress at the coffee shop in the Monroe Street store. As part of their organizing technique, Union representatives frequently came to the coffee shop, ordered coffee, sat in a booth, and talked with store employees when they came to the coffee shop to take breaks. On one occasion, Union representatives Robert Carrasquello and Richard Eddington came to the coffee shop and sat down at a table. Miss Curtis passed by their table and said hello as she passed. Her supervisor, Juanita (Brown) Katt, saw her speaking to the Union representatives and immediately told her to refrain from union activity on Company time "for her own good." On several occasions, Mrs. Katt spoke to

Miss Curtis about the Union, and on some of those occasions asked her why she wanted a union, why things could not be worked out without a union, and why a union was necessary. To this last question, Miss Curtis replied that she thought a union was necessary because whenever a problem arose, it was shifted from one person to another and nothing was ever solved.

I credit the testimony of employee Shiela Lemble that, sometime in February, she had a private conversation with Pieh near the smokehouse at the Monroe Street store. During the course of this conversation, Pieh told Miss Lemble that, should a union come in at Churchill's, they would discontinue giving employees free coffee. He also said that food service employees would have to wear hairnets, the Company would lower the store temperature by ten degrees, and employees would have more difficulty getting days off. He told her that employees would not be allowed to switch days off with other employees and would be reprimanded if they came to work late. He observed that things were very lax at the store, but with a union, it would be "bang, bang, bang!" He also said that, with a Union, the store would have set hours for employees and could not schedule part-time students. Pieh went on to say that the Company could not pay union scale and, if it could not pay union scale, it could not open any new stores and would become stagnant and die. He then said that, if a union did not come in, she would have a good healthy raise within a year.

Miss Lemble was a personal friend of Pieh's daughter and frequently visited the Pieh home. On one occasion in April, Pieh spoke to Miss Lemble at the store and said, "You weren't at the card game Tuesday night. I know where you were and you know where you were." In fact, Miss Lemble had been attending a Union meeting.

Miss Lemble frequently wore a Union button to work. Rather than use a conventional button, many union sympathizers wore a "smiley" button, which bore no inscription but merely contained a sketch of a face with a smile. It is undisputed that Respondent's management was aware of the significance of the "smiley" button. She and other Meat Department employees were accustomed to using the time clock at the front of the Monroe Street store to punch in and out, rather than using the clock which was located in the Meat Department. Sometime in April, 1980, she and other employees went to the front of the store and punched out for a coffee break. On the way to the clock, she greeted other employees at the cash registers using an informal code greeting which some of the women union sympathizers had devised among themselves.[13] On her return from break, she was told by Pieh that Front End Supervisor Joyce Petee wanted her to keep her time card in the rack near the Meat Department because she did not want Miss Lemble to have any connection or conversation with the employees in the front of the store. Miss Lemble and all of the other Meat Department employees were required to use the clock in the department exclusively until Nebb made a protest to Pieh and the former practice was resumed.

Robert C. Kennedy, Jr., is presently the Grocery Manager at Monroe Street. He was formerly a stock supervisor. During the spring of 1980, he frequently spoke to employees about the organizing drive. I credit the testimony of employee Marci Zielinski that, during one of these conversations, Kennedy told them that the

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[13] Union sympathizers would occasionally greet friends having the same persuasion by attaching the ending "Lou" to the other employee's name, e.g., Mary would become Mary Lou, Cindy would become Cindy Lou, etc.

Company did not have to agree to anything a union proposed and could string out negotiations over a long period of time. I do not credit her disputed testimony that Kennedy also said that, if a Union came in, it would insist upon the hiring of full-time employees so part-time employees like Miss Zielinski would be laid off.

It is established in the record that, in years prior to 1980, the Respondent followed a policy of granting leaves of absence to summer employees, many of whom were college students, which assured them of employment during the Christmas vacation period when they returned home to the Toledo area. It is also well established that, at least as it applied to Miss Zielinski, this policy was not followed during 1980. She worked throughout the summer and, near the end of that period, made repeated requests of Kennedy and others for a leave of absence which would assure her of a position at Christmas time. She was told to submit her request on a Company form but the form was never provided.

Just before she was about to leave to go to college, Miss Zielinski was told by Kennedy that the Company was not granting any more leaves of absence to part-time employees but she could come back to the store at Christmas time, apply for a job, and take her chances with any other applicants who might want jobs at that time. I credit her testimony that Kennedy said that this change of policy came about because of the union activity which was taking place in the store. He suggested that she could take her case to Geerken if she chose. Geerken was in the area so she made a request for a leave of absence to him. Geerken told her that leaves of absences were not being granted any longer to summer employees because the job market was such that the Company had all of the applicants it needed. He assured her that the decision had nothing to do with union activity.

Miss Zielinski later came to the store with her mother, who roundly berated Kennedy for refusing to give her daughter a leave of absence. While Miss Zielinski visited the store in the fall of 1980 from time to time as a visitor, she did not renew her request for Christmas employment and did not receive any. Any summer employee who requested Christmas employment was told the same story that was given to Miss Zielinski. However six summer employees were rehired at Christmas.

Gordon Zielinski, the brother of Marci Zielinski, worked as a sales clerk at the Home Center in the Monroe Street store. He signed a Union card in January, attended Union meetings, and wore a Union button at the store. According to Zielinski, late in March, his supervisor, Carr, called him into the office and requested that he sign a disciplinary slip for tardiness. While the two of them were together in the office, Carr asked Zielinski why he wanted a union. Zielinski replied that it was because he wanted better wages and benefits for part-time employees and also because he wanted some representation. Carr told him that the Company would not agree to increased wages which were comparable to a unionized store, such as the Ontario Store, and that General Churchill would start from scratch if he had to engage in collective bargaining. Zielinski replied that he did not think the General could have his own way completely and insisted that he would have to sit down and negotiate with the Union. I discredit Zielinski's testimony because I found him to be an unreliable witness.

When Flower Shop Supervisor Rich Glauser gave former employee Marilyn Feeback an evaluation of July, 1980, he gave her two zeros on a scale of ten—for loyalty

and for absenteeism. When she asked him why he gave her a zero for loyalty, Glauser replied that she never did any work outside of business hours that she was not paid for and he knew for a fact that she had attended union meetings and functions.[14] Miss Feeback asked how he had become aware of this fact and he simply replied that he had heard it through the grapevine. Later, after she had complained about this rating to Dembowski, the latter called Glauser into his office and gave him some instructions about the proper method of completing employee rating sheets. Thereafter, Glauser changed the rating from a zero to a four.

Following her evaluation, Miss Feeback received a raise in her hourly rate. However, her hours were cut. In September, after returning from bereavement leave, she noticed from the posted schedule for the Flower Shop that her weekly working time had been reduced by a full day. When she asked Glauser why this change had been made, Glauser told her that the shop was losing money and cut backs had to be made. Miss Feeback testified that she thought she was the only person in the Flower Shop to suffer reduced hours and further testified that she was the second most senior employee in that department. However, Glauser testified that reductions in hours were made across the board with respect to all Flower Shop employees. (Glauser had previously told Winans that, if the Union came in, he could probably afford to keep only one or two of his employees because of union rates). Dembowski explained in his testimony that the Flower Shop had been running for several months with excessive labor costs and he told Glauser

[14] Glauser said he did not know anything about Miss Feeback's union activities or sympathies. He later testified that he saw her picture in a union newspaper. I find his testimony in this regard unreliable and conclude that he knew that Miss Feeback was a Union supporter.

that these costs had to be reduced. He further explained that the impact of the cutback was imposed more heavily on part-time employees, such as Miss Feeback, because a reduction in hours of a full-time employee might change his status to part time and thus cause her to lose fringe benefits as well as hourly compensation. Part-time employees, as noted above, receive few fringe benefits.

Since her employment in September, 1978, Rebecca Donnelly had been employed on the midnight shift as a clerk and cashier in the Hardware Department at the Monroe Street store. She was classified as a part-time employee, meaning that she worked less than 32 hours per week. She was employed between the hours of 11:30 p.m., and 7:30 a.m. Until some time in January or February, 1980, she was engaged to Robert Spitler, the Assistant Night Stock Manager at that store.

Miss Donnelly had been unhappy for a period of time because she had failed to receive a wage increase which assertedly had been promised to her. In fact, she had made a discrimination complaint to an unnamed organization because of the failure of the Respondent to grant her a wage increase. An investigator came to the store to inquire into her complaint but apparently nothing came of the investigation. In January, her ex-fiance asked Miss Donnelly if she wished to join the union. She said that she needed more time to think about the matter. I credit her statement that, despite the fact that Spitler was a member of the Respondent's management, he said he would retain a card for her to sign if she desired to do so.

Miss Donnelly attended the Union meeting which took place on or about January 29. She signed a card at that time. She attended other Union meetings as well. On the day following the Union meeting, she had a

discussion with Carr concerning a pay raise. Carr responded to her inquiry about a raise by asking her about phone calls which she made to various outside organizations concerning the raise. I credit her testimony that, during this conversation, she told Carr that she had signed a union card.

During the midnight shift of January 16-17, Miss Donnelly and a fellow employee, Nancy Hendricks, were taking a break. Apparently they had overstayed the time allotted for the break because Spitler, who was in charge of the store that night, came out of his office to tell them to go back to work. Miss Donnelly retorted by asking Spitler whether he had been checking timecards. They got into an argument, in the course of which Miss Donnelly suggested that Spitler go back into the office and read a magazine or watch television, adding "You are not my supervisor." Miss Hendricks immediately returned to work and, after the exchange of words with Spitler, so did Miss Donnelly.[15]

A few minutes later, Spitler wrote up a disciplinary report on Miss Donnelly for insubordination. In setting forth the facts, he stated on the report, "She was on her break period. Then when she came back then sat down for 15 minutes more and then I went up to her and asked her to go back to work and then she said that, I don't have to, and said that Larry and I was not her boss. She said that Bob Carr told her that. I wonder if Bob told her it was all right to walk around and talk half the

[15] In an unusual conflict of testimony, Miss Donnelly testified that she told Spitler to "go to hell." Spitler said he had no recollection of this remark. She also said that Spitler called her a "bitch" and a "whore." Spitler's denial of the latter accusation is corroborated by Miss Hendricks.

night!" (sic)[16] He forwarded the write-up to Carr, who in turn gave it Geerken. Although no recommendation had been made by Carr or Spitler to fire Miss Donnelly, Geerken decided upon this course of action and instructed Carr to notify her of this decision on Monday night when she reported for work. At the same time, Geerken decided to discontinue the night operation of the Hardware Department immediately because it had proved to be unprofitable. A decision to discontinue the operation had been previously made and was scheduled to take effect the week following Miss Donnelly's discharge but the dispute which arose between Spitler and his former fiancee prompted Geerken to accelerate the termination of this shift.

At the beginning of the midnight shift on February 18, Carr presented the write-up slip to Miss Donnelly and discussed it with her. Miss Donnelly wrote on the back of the slip "All I have to say is it was not Co. concerned. It (was) a personal matter between Charlie and myself." Carr also told her that the midnight shift in the Hardware Department was being discontinued and informed her that she would be able to collect unemployment compensation. Miss Donnelly asserts, and Carr denies, that he offered to give her a letter of recommendation to assist her in getting a job. She was given the equivalent of a week's wages, which Dombowski said was accrued vacation pay.[17]

[16] In Miss Donnelly's view, she was never under the supervisory control of Spitler. She felt that she was under the supervision of the night manager, Larry Stribe. However, Stribe was not at work on the night in question and Spitler was the highest ranking management representative at the store.

[17] The Respondent's Employee Handbook states that "employees who are terminated for dishonesty, insubordination, or other serious infraction of rules and regulations will forfeit any earned vacation pay."

Spitler played no part in the decision to discharge Miss Donnelly nor was he asked for a recommendation in this regard. He testified that, when he wrote up the disciplinary slip in question, he envisioned that what would occur is that someone would "talk to her and straighten her around." He further testified that he did not know whether in fact she had been laid off or had been discharged for insubordination. Miss Donnelly felt that she had been laid off and called Dombowski and Geerken on two occasions during the ensuing weeks to see if they had additional hours for her. However, Carr and Geerken testified that she was in fact discharged for insubordination.

The day following Miss Donnelly's termination, she engaged in handbilling the store on behalf of the Union. Shortly thereafter she was referred for employment to a unionized grocery store. When she called Geerken in March to ask for employment at Churchill's, he asked her why she wanted to come back to work at the Respondent's store when she was making more money at Food Town. Her reply was that she just liked working at Churchill's. She was never reemployed by the Respondent.

William D. Winans worked for the Respondent for about 3 months in early 1980 as a carry-out and front-end employee at the Monroe Street store. He signed a union card, attended union meetings, and before his termination, handbilled the store on two occasions on behalf of the Union.[18] He also wore a union button at the

[18] I credit Winans' testimony that, as he was handbilling the Monroe Street store, Carr came to the front of the store and took pictures of the event with a Polaroid Instamatic camera. Carr admitted taking pictures, denied he took pictures of employees engaged in handbilling, and explained that he was only photographing stranger pickets because he feared they might do damage to his personal vehicle which was parked in the store parking lot.

store and engaged in a lengthy discussion with his supervisor, Joyce Petree, in which he vigorously supported the Union's position in the organizing campaign. During a discussion, which lasted about half an hour, Winans told Mrs. Petree that he was in favor of the Union and nothing she could say would change his mind.[19] Mrs. Petree had no answers to certain questions he posed concerning wage rates and promotions so she told him he could talk with Geerken and Dombowski about these matters if he wanted. Mrs. Petree did say to Winans that her husband had worked for a unionized trucking company and the union at that firm had done nothing for him. As the discussion wore on, Mrs. Petree then escorted Winans to the front of the store and asked him, in the presence of Geerken and Dombowski, if he had any questions. Winans responded by asking Geerken and Dombowski one question, the substance of which does not appear in the record.

Sometime before his discharge, Winans had another conversation regarding the union campaign with Glauser. I credit Winans' testimony to the effect that Glauser asked him on this occasion if he supported the Union and also asked him whether any interesting points had been raised at the Union meeting the preceeding evening. Winans informed Glauser that he was in favor of the Union but apparently said nothing about the meeting. Glauser told Winans that, if the Union came in, he would reduce his section from four to two girls.

Within two weeks preceeding his discharge, Winans received three disciplinary write-ups which ostensibly brought about his termination. On March 5, he was

[19] Mrs. Petree did not testify at the hearing and her absence was unexplained. Under well-established rules of evidence, I conclude that, had she testified, her testimony would have supported the allegations in the Amended Complaint.

written up by Mrs. Petree for overstaying a 15-minute break. Winans admitted that he had spent an excessive amount of time on this occasion discussing the union campaign with Glauser. On March 13, Winans was written up for parking his car in a section of the store parking lot reserved for customers. On March 19, Winans received his third and final disciplinary write-up. The narrative on the write-up stated in pertinent part: "Marcie (Zielinski) and Bill were bagging at the end of register 10, talking and not paying attention to the cashier next door, who had to bag her own groceries." He was told by Cheryl Hartline that he was being written up for talking at a register while working with another employee. Following this infraction, he was fired the next day by higher management.

An eye-witness account giving the Respondent's version of the incident leading to Winans' termination is not available since Cheryl Hartline, the supervisor who wrote up Winans, did not testify. Her absence from the hearing was not explained. According to Winans, he and Miss Zielinski had both been bagging a large order of groceries at a checkout register and were talking about a show or concert that was coming to Toledo. The best that Winans can say about the incident was that a customer at the next register must have had to bag her own groceries. He did not notice anyone at the next register nor was his attention invited to the situation by the cashier who was checking out the customer's groceries. Having been written up, he was called to the office the following day and told by Mrs. Petree and Dombowski that he was being discharged because he had three write-ups during his probationary period. Dombowski informed him that Mrs. Petree had recommended this action but Winans objected saying that the action was being taken because of his union

activities. He was told he could appeal this decision to Geerkin if he wished. Winans went upstairs to the corporate offices to see Geerken and again accused the Respondent of firing him for union activities. Geerken denied the accusation so Winans left the store.

3. *The Alexis Road Store*

Carole Ebersole is a part-time cashier at the Respondent's Alexis Road store. In April, 1980, Douglas Bortz, the manager of the Byrne Road store, was temporarily transferred to Alexis Road. During his stay at Alexis Road, Bortz talked with many employees concerning the organizing campaign. I credit Mrs. Ebersole's testimony that Bortz had a private conversation with her in a small room on the store premises. During this conversation he told her that if the Union came in, the Company might as well "throw the box away." His reference was to a small box which the Respondent maintained for the purpose of collecting written applications from employees for time off and for schedule changes. On the topic of wages, Mrs. Ebersole complained to Bortz that she did not think it was fair that some cashiers were paid more than others and expressed the thought that all cashiers should be paid the same amount. Bortz' reply was that he was aware that Churchill had done wrong in the past but they would have to make things right if the Union lost, adding that the Company could not do anything until the Union lost. Bortz also told her that he did not care how she personally felt about unionization.

4. *The No-Solicitation Rule*

Both the General Counsel and the Respondent agree that the Respondent has maintained a no-solicitation rule in effect at the Respondent's stores. They sharply

disagree as to the perameters of this rule. The exact nature and description of the rule is difficult to determine from the evidence in the record. The Employee Handbook contains the statement on solicitations quoted *supra* in footnote 11.[20] While these restrictions are set forth in a Company publication, it does not appear that either the Respondent's management or employees were apprised of this regulation. When asked about the source of the Company's no-solicitation rule and an explanation of its contents, various witnesses gave various replies. Several witnesses pointed to the sign "No solicitation" which appeared on the front of the Monroe Street store and testified that this was the rule with which they were familiar. Some expressed the opinion that this posted rule was directed to employees and strangers alike. Pieh stated that the rule which was posted on the front door of the Monroe Street store meant that communications by an employee were prohibited except on his own time, meaning break time, lunch time, and after work. After checking which his superiors, Pieh told Nebb that it was permissible for Nebb to solicit if he was off the clock and the employee being solicited was off the clock, but his efforts would have to be confined to non-work areas. Pieh explained that the prohibition against soliciting for the Union on the Company telephone was a long-standing policy and stemmed from the fact that an employee is hired to do a job and not to solicit for some other business. Mrs. Katt expressed some familiarity with the rule as set forth in the Employee Handbook and said that an employee's break time was his own time but that employees were not free to solicit on paid breaks, i.e., time off for which they did not have to punch out as distinguished from breaks when they punched out.

[20] Elsewhere in the Employee Handbook "unauthorized solicitations" are set forth as a minor infraction of Company rules.

Dombowski testified that the no-solicitation rule which prevailed at the Respondent's store was an orally-promulgated rule. He stated that the rule, as posted on the front of the Monroe Street store, applied both to employees and to customers, but then qualified his statement by saying that the no-solicitation policy prohibited solicitations on Company time, not on working time. He said that employees could organize only on their breaks or at lunch but could do so before and after work. According to Dombowski, solicitations of any kind were not permitted outside the store in the parking lot but exceptions were made for the veterans' annual poppy sale and a campaign for funds in the Toledo area known as the old newsboys' campaign.

E. *The Enlargement of the Respondent's Health Insurance Plan*

For a number of years, the Respondent maintained a health insurance plan with a private carrier which covered the medical and hospital expenses of its full-time employees, i.e., those who worked in excess of 32 hours per week. However, the plan did not provide for dependent coverage unless the employee paid an extra premium out of his own pocket. This omission was a cause of employee criticism.[21]

Beginning in the late summer or fall of 1979, the Respondent began to consider the possibility of discontinuing the use of an outside carrier and of providing health insurance coverage to its employees through a self-insurance fund. It asked the broker who

[21] For example, Nebb included among his long standing grievances a complaint to Pieh about lack of dependent coverage in the Respondent's medical and hospital plan. Miss Shultz mentioned lack of dependent coverage in the letter which she mailed to all of the Respondent's employees on behalf of the Union sometime in April, 1980.

had provided the Company with casualty insurance coverage to investigate this possibility and to provide the Respondent with quotations as to the cost of such a plan and whether any increase in benefits which could be realized from self-insurance without an increase in costs to the Company. The broker delayed several months in providing the requested information but, in late February or early March, gave the Respondent a quote which included the estimated cost of self-insurance for normal loss and the cost of a catastrophe override premium with a carrier who would pay unusually large claims which might occasionally arise. The broker also suggested at that time that the Respondent wait a few more weeks before concluding a deal because he felt that he could obtain better catastrophe coverage from another insurance company. The Respondent agreed.

Early in April, the broker presented the Respondent with another quotation and, within a matter of days, the Respondent executed the documents necessary to put the insurance plan into effect. One of the elements contained in the new plan was dependent coverage. On April 14, one month after the representation petitions were filed and two weeks before the existing health insurance coverage with an outside carrier was due to expire, General Churchill sent a letter to all employees announcing a new health insurance plan, effective May 1. The announcement stated that the new plan included no change for dependent coverage, fully paid hospital coverage, free prescriptions, improved diagnostic, X-ray, and laboratory services, no deductible for surgery or anesthesia, $100 per week disability income, improved dental coverage, and $5,000 in life insurance. Churchill commented in his letter that the new plan was "one of the finest health care plans in the Toledo area and it is far better than any of those offered by our competitors. All full-time employees are eligible for this plan."

C. *Analysis and Conclusions*

1. Independent Violations of Section 8(a)(1) of the Act

The record in this case contains an undifferentiated combination of the trival and the serious. The independent violations of Section 8(a)(1) to be found in the record are the following:

(a) It is well-established that the solicitation of employee grievances during an organizing campaign with a view toward ultimately redressing those grievances is an unfair labor practice. *Knapp Foods, Inc.*, 247 NLRB 146; *Montgomery Ward & Co., Inc., (Greensburg, Pa)*, 253 NLRB No. 23; *Berger Transfer and Storage Company, Inc.*, 253 NLRB No. 2. In February, 1980, immediately after learning of the organizing campaign, Shook held a meeting of warehouse employees, at which he stated, that he thought that the warehouse group was one big happy family. He asked specific employees what their problems were, adding that they should have settled their problems internally without third-party intervention, and then threw the floor open to a general discussion of employee complaints. Some of these complaints, such as lack of a specified lunch hour and Tucker's complaint that he was entitled to health insurance benefits, were quickly remedied. Another discussion, held a few days later between the same group of employees and Geerken when employee complaints were rehashed, was simply a resumption of the earlier meeting. Both events constitute solicitations of grievances in violation of Section 8(a)(1) of the Act.

At a later time, during an employee evaluation session, Pieh and Nebb discussed the Union. They also discussed, in response to Pieh invitation, the grievances which prompted Nebb to take an active role in the

organizing campaign. Pieh's statement to Nebb that his complaint concerning a small wage differential for assistant managers should be looked into after this "union thing" is over, is clear evidence of the purpose of soliciting the grievance. This solicitation of Nebb's grievances by Pieh constituted a violation of Section 8(a)(1) of the Act, and Pieh's statement to Nebb accompanying the solicitation amounts to an unlawful promise of the benefits which also violates Section 8(a)(1) of the Act.

(b) Shook's admitted threat to warehouse employees at the February, 1980, meeting, that if the Union came in, the warehouse would be closed and employees would be out of jobs and ineligible for unemployment compensation, is a serious violation of Section 8(a)(1) of the Act.

(c) Glauser's statement to Wielgopolski that, in the event of unionization, there would be layoffs at the store, constitutes a threat which violates Section 8(a)(1) of the Act.

(d) Glauser's statement to Wielgopolski on the same occasion that there would be a strike because the Respondent would not give the Union a contract constitutes another violation of Section 8(a)(1) of the Act.

(e) Glauser's questioning of Wielgopolski, in the context of the above-recited remarks, as to how he felt about the Union, constitutes coercive interrogation and a violation of Section 8(a)(1) of the Act.

(f) Credited testimony indicates that, in February, 1980, Langenfelder asked Wingler if he attended a union meeting, how large the meeting was, and what he thought of the meeting. Such questioning is coercive and violates Section 8(a)(1) of the Act.

(g) Credited testimony also indicates that, shortly after the discharge of Rebecca Donnelly, Wingler, and Kay Miller stated in Langenfelder's presence that she had obtained a job at Food Town, a unionized store. Langenfelder then told them that, in a couple of weeks, he hoped the Union could find a lot of other jobs. This statement was an implied threat to discharge union sympathizers and violated Section 8(a)(1) of the Act. The fact that Dombowski tried to calm Wingler's fears of discharge after hearing Wingler's complaint about Langenfelder's statements does not prevent the earlier remarks from being an unfair labor practice. His efforts simply confirm the coercive character of Langenfelder's statements.

(h) Pieh repeatedly questioned Nebb about union matters. He asked Nebb on one occasion how many people had showed up at a union meeting, pointed Nebb out to another supervisor as being a union leader who was a source of information concerning union efforts, asked Nebb how many of his people were getting involved with the union, and asked Nebb if the union was compensating him for his union activities. Despite the fact that such questions were posed to a known sympathizer, such questions and statements constitute violations of Section 8(a)(1) of the Act. *PPG Industries, Inc.*, 251 NLRB No. 156.

(j) Pieh's statement to Nebb that the Company had sources of information within the union organizing effort constitutes an attempt to convey the impression that union activities of employees were the subject of Company surveillance and is a violation of Section 8(a)(1) of the Act.

(k) Pieh's statements to Dewayne Bell that he heard he had attended a union meeting and his admission that he made the statement in order to get Bell to admit his union activities constitutes unlawful interrogation which violates Section 8(a)(1) of the Act.

(l) Pieh's statement to Nebb that General Churchill would be shocked to see his name at the top of the list of union organizers constitutes an attempt to create the impression that the union activities of employees were subject to Company surveillance in violation of Section 8(a)(1) of the Act.

(m) After Penelope Shultz disseminated a campaign letter to 400 store employees, Pieh asked her where she got the information contained in the letter to the effect that the Company had made $6.4 million in profits. I do not regard this question as coercive interrogation, inasmuch as Miss Shultz stated in the letter that she invited inquiries concerning its contents and would personally stand behind whatever she had written.

(n) Mrs. Katt asked Christine Curtis several questions concerning her union efforts, including why she wanted a union and why she thought a union was necessary. These questions constitute a violation of Section 8(a)(1) of the Act.

(o) Pieh's statements to Sheila Lemble near the smokehouse at the Monroe Street store in February, 1980, concerning changes which would occur in working conditions if the Union were successful constitute unlawful threats which violate Section 8(a)(1) of the Act.

(p) Pieh's statement on the day following a Union meeting to Miss Lemble that he knew where she had been when she failed to show up for a card game at his house the previous evening constitutes an attempt to

convey the impression that the union activities of employees were subject to company surveillance and violates Section 8(a)(1) of the Act.

(q) When Kennedy told Marci Zielinski that there had been a change in company policy concerning the granting of leaves of absence to summer employees to work at Christmastime and that the discontinuance of this policy was due to the Union organizing campaign, this statement violated Section 8(a)(1) of the Act.

(r) Having discredited the testimony of Gordon Zielinski, I recommend that so much of the Amended Complaint which relates to allegations concerning him and Richard Carr be dismissed.

(s) When Mrs. Petree took William Winans to see Geerken and Dombowski and asked him, in their presence, if he had any questions concerning the organizational campaign, she caused him some embarrassment because she was, in effect, interrogating him and pointing out to Respondent's top management the identity of a union activist. Such an action is an interference with union activities and a violation of Section 8(a)(1) of the Act.

(t) Glauser's questioning of Winans as to how he felt about the Union and whether any interesting points had been raised at a Union meeting Winans attended constitute unlawful interrogation within the meaning of Section 8(a)(1) of the Act. Glauser's further statement to Winans that he would reduce the size of his section if the Union came in is a threat to discharge employees in reprisal for union activities and violates Section 8(a)(1) of the Act.

(u) Bortz's statement to Mrs. Ebersole that he would discontinue the practice of permitting employees to ask for days off and to rearrange their schedule in the event of unionization is a threat which violates Section 8(a)(1) of the Act.

(v) Bortz's further statement to her that the company would make improvements in benefits if the Union lost is a promise of unstated benefits which violates Section 8(a)(1) of the Act.

(w) Carr admitted photographing pickets as they were patrolling at the Monroe Street store but denies photographing any employees in the process of doing so. I discredit the denial and conclude that, by photographing employees in the exercise of rights guaranteed to them by Section 7 of the Act, the Respondent violated Section 8(a)(1) of the Act.

(x) An employer may lawfully forbid employees from engaging in solicitations for any non-work related object so long as the prohibition is limited to working time, is non-discriminatory in its application, and there is no independent evidence that the rule is being imposed for union-related considerations. However, if a no-solicitation rule is overly broad, it is an unlawful interference with employee rights guaranteed by Section 7 of the Act.[22] Furthermore, if the parameters of a no-solicitation rule are vague or ambiguous, the risk of non-compliance with the limitations established by the Supreme Court falls on the employer. *G. C. Murphy, Inc.*, 171 NLRB 370; *Knapp Foods, Inc.*, 247 NLRB No. 146; *N.L.R.B. v. Charles Company*, 341 F.2d. 870 (2nd Cir., 1965).

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[22] *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793 (1945); *N.L.R.B. v. Babcock & Wilcox*, 351 U.S. 105 (1956); *United Steelworkers of America (NuTone)*, 357 U.S. 357 (1958); *Stoddard-Quirk Manufacturing Company*, 138 NLRB 615; See also *TWR Bearing Division, TWR Inc.*, 257 NLRB No. 47.

The scope of the rule set forth in the Respondent's Employee Handbook complies with the requirements of the Supreme Court decisions. However it appears that both management and employee witnesses were unfamiliar with the rule as recited therein and several pointed to the flat "no solicitation" notice posted on the front door of the store as being the rule by which they were bound. This rule is drastically overbroad and, if applicable to employees, constitutes an interference with their Section 7 rights. Some witnesses indicated that the posted rule applied both to strangers and to employees. Other witnesses indicated that the no-solicitation rule was an oral rule which permitted soliciting on non-work time and forbade solicitating during working time. Such a rule is a valid rule. Another witness said that employees could solicit during those breaks they took when they were not required to punch out.

In light of these varying versions of the scope of the Respondent's no-solicitation rule—some describing a legal rule and some describing an illegal one—it can only be concluded that the Respondent's employees were being subject to restrictions which suffer from the vice of vagueness. Accordingly, when the Respondent attempted to restrict the union activities of its employees on company premises by means of an ambiguous no-solicitation rule, it violated Section 8(a)(1) of the Act.

Nowhere in the rule in any of its announced versions was a clerk forbidden to greet or have casual conversations with customers. Indeed, it would hardly be in keeping with the functions of a clerk or waitress to avoid greeting or speaking to a customer. Accordingly, when Mrs. Katt issued a warning to Christine Curtis after she gave a casual greeting to two union organizers

who were customers at the Monroe Street coffee shop, Mrs. Katt was not enforcing the provisions of any no-solicitation rule. The real thrust of her warning was to prevail upon Miss Curtis to avoid union representatives. Such a warning constitutes a violation of Section 8(a)(1) of the Act. *Montgomery Ward and Co., Inc.*, 256 NLRB No. 134.

Similarly, an employer had every right to restrict the use of company telephones to business-related conversations and to forbid employees from using company phones for personal reasons. However, this employer did not do so and a practice grew up over a long period of time of permitting employees to use company phones for personal matters so long as their calls did not tie up the switchboard. The only exception to this admittedly loose practice came about when Nebb called his counterparts in the meat department at another store, informed them of an upcoming union meeting, and asked if anyone was interested in taking part in the organizing effort. For this call he was reprimanded and told that such calls should not be made on company phones. When an employer singles out union activity as its only restriction on the private use of company phones, it is not acting to preserve the use of the phones for company business. It is interfering with union activity, and such interference constitutes a violation of Section 8(a)(1) of the Act.

(y) When an employer confers upon his employees an increase in wages or benefits during the course of a union organizing campaign, its action is presumptively a violation of the Act. *N.L.R.B. v. Exchange Parts, Inc.*, 375 U.S. 405 (1964). It is incumbent upon any employer seeking to avoid the consequences of this presumption to justify its action on some non-discriminatory business-related basis. In the present case, the Respondent

announced to all of its employees a new and enlarged program of medical and insurance benefits on April 14, 1980, just a month after it received a demand for recognition from the Union covering its warehouse unit and two petitions for representation elections relating to its Monroe Street and Alexis Road stores. Respondent's defense is that it was contemplating the institution of these improvements in its insurance program all along and that the timing of the announcement and the implementation of the program coincidental with the Union's organizing effort was purely happenstance. The argument strains credulity.

Respondent's long-standing desire to improve the criticized deficiencies in its medical insurance program was a low priority item on the corporate agenda until the advent of the Union drive. In its discussions with its insurance broker concerning self-insurance and enlarged benefits, months went by, nothing happened, and no one said anything. Shortly after the organizing campaign swung into a serious pre-election phase, a greatly expanded program of health insurance, as well as other insurance, was in place in a matter of days.

It was by no means indispensable for the Respondent to await the expiration of its former insurance policy to adopt a program of partial self-insurance in order for it to provide the insurance benefits announced to employees on April 14. The improvements could have been made months or years before the Union started its organizing campaign. In announcing the revised plan, General Churchill pointed out to his employees that "it is far better than any of those offered by our competitors." This was simply a veiled reference to health insurance plans then in effect unionized stores in the Toledo area. Far from being coincidental with the

union drive, the new health plan was prompted by a desire to head off the union drive, a desire which also manifested itself in nearly two dozen separate and different violations of the Act which the Respondent committed within the same time frame it was revising its health insurance program. Accordingly, I conclude that, by instituting and announcing a revised and improved plan of health and other insurance for its employees, the Respondent herein violated Section 8(a)(1) of the Act.

2. The Violations of Section 8(a)(3) of the Act.

As noted above, the acts and conduct of the Respondent in discharging, transferring, or otherwise adversely affecting the hire and tenure of its employees during the course of the organizing drive[23] must be measured against a background of repeated and well-established unfair labor practices aimed at preventing the unionization of its warehouse and stores. As a result, events which might otherwise take on a neutral coloration become tinged with illegality as the Respondent's determination to resist unionization spilled over from threats and promises into adverse actions taken against employees.

a. The Discharge of Richard Doll

Richard Doll was a reliable and likeable employee, according to Mrs. Faust. He had worked at the warehouse for nearly two years at the time of his discharge in late March, 1980. He had a problem and his problem was well known to supervisors and employees alike, but it was a problem which they were willing and

[23] In fact, the threat of unionization is still extant since the representation petitions filed early in 1980 have not resulted in elections because of blocking charges which are yet unresolved.

able to live with. At no time did his immediate supervisors at the warehouse have any disposition to discharge Doll but, as in the cases of the other discriminatees named in the Amended Complaint, deficiencies which the employee's immediate supervisors were willing either to overlook or to recommend for routine internal correction became, in the mind of Company Vice-President Richard Geerken, grounds for discharge. Doll's termination was a case in point.

Doll had been coming to work from time to time with beer on his breath for as long as he had been working for the Respondent. His drinking habits had come to the notice of Shook and Mrs. Faust, as well as supervisors outside the warehouse, because of a string of minor accidents which presumably arose as a result of Doll's operating company equipment under the influence of alcohol. None of these events provoked more than a mild rebuke. Indeed, none of these events prevented Respondent's management from having an occasional beer with Doll at lunchtime at the Roadhouse then returning to work afterwards. However, once Doll had evidenced his union sympathies by handbilling a store, the Respondent's attitude, at least as it was reflected in the actions of Geerken, dramatically changed. On Doll's final day of work, Geerken visited the Warehouse and orchestrated a series of events designed to provide the company with conclusive proof that Doll had been drinking in violation of a provision of the Employee Handbook, a provision which had been overlooked in his case for nearly two years. Mrs. Faust found Doll on his lunch break at his usual haunt doing his usual thing and reported her expected findings to Shook, who confirmed them by phoning the bartender. After Doll returned, he was written up for a three-day suspension. When the

disciplinary form reached Geerken's desk, the recommended suspension was converted into a discharge and Doll was so informed.

Doll was a known activist who was discharged for a habit which had been indulged by the Respondent until his union sympathies became known and reported. The discharge came just after the Respondent received a demand for recognition as the bargaining agent for the warehouse unit and at a time the Respondent was engaging in a campaign of unfair labor practices designed to prevent unionization at any cost. In light of these factors, as well as the difference of opinion within the ranks of the Respondent's management as to the gravity of the event which triggered the discharge, I conclude that the Respondent's stated reason for firing Doll was wholly pretextual and that its real reason was its desire to eliminate a known union enthusiast from its payroll. Accordingly, the discharge of Richard Doll violated Section 8(a)(1) and (3) of the Act.

b. The Reduction in Hours of Charles Tucker

Tucker was also a known union supporter who had evidenced his union sympathies by handbilling two of the Respondent's stores. His complaint before the Board was not that he was discharged but that his working hours were cut because of his union activities. The weekly summary of Tucker's hours during the late winter and spring of 1980 show a fluctuation in his work week but hardly a steady decline or a precipitous drop. Indeed, in the mid-summer of 1980, he was working more hours than he had worked in several individual weeks in March and April. Mrs. Faust's refusal to provide Tucker with his time cards at a time Tucker was voicing a complaint to her about a reduction in working hours is a suspicious

circumstance but it is not enough to show either discriminatory motivation or, more importantly, that any discrimination in fact took place. In light of the paucity of evidence on this latter point, I must conclude that the General Counsel has failed to prove by a preponderance of the evidence that Tucker suffered an illegally motivated loss of hours, so the provision of the Amended Complaint on this point must be dismissed.

c. The Reassignment of Joseph Wielgopolski

Wielgopolski worked for the Respondent about five months as a front-end employee, meaning that he was normally rotated into and out of a number of menial jobs in the grocery store as the demand for his services arose. He testified that he signed up employees in the store and that not long after Geerken saw him signing up an employee, he was placed in isolation by being assigned consistently to load groceries into customer cars in front of the store. The impression that Wielgopolski left with the Respondent's supervisory force was of such magnitude that they cannot even remember him as an employee, though no formal contention was advanced that he did not in fact work at the store.

Isolating an employee from other employees for discriminatory reasons is a violation of the Act but, like any other discriminatory act, it must be established in the record by something more than surmise or suspicion. In this case, we have little more to go on than Wielgopolski's surmise. Loading groceries into customer automobiles was one of the jobs normally assigned to a front-end employee so there is nothing unusual or noteworthy in the fact that such an assignment was made to Wielgopolski. Wielgopolski is apparently unhappy about the fact that he filled this job for two consecutive weeks before being shifted to some other

task. However, on the state of the record in this case, there is no way to determine how long a normal tour of duty was at this particular post or what personnel demands and options existed at the time which might have dictated this assignment. Moreover, Wielgopolski was ultimately given another less isolated assignment or series of assignments, an unlikely turn of events had the Respondent maintained any fixed intention of placing Wielgopolski is a position where he could not talk union to other employees at the jobsite. Accordingly, I would dismiss the portion of the Amended Complaint which alleges that Joseph Wielgopolski was given a job assignment on a discriminatory basis.

d. The Reduction in Overtime Hours of Clyde Nebb

Nebb's complaint that his overtime hours were reduced because of his union activities presents a very close question of fact. Nebb was a activist and was suspected by his immediate supervisor of being a leader in the union movement. A great deal of independent 8(a)(1) conduct committed by the Respondent was directed particularly at Nebb. As indicated from the summary of hours worked by Nebb throughout 1980, Nebb did suffer in the aggregate a differential in hours worked between the first part of 1980 and the last part of 1980 of approximately 1.4 hours per week. The reduction coincided with the replacement at the Monroe Street Meat Department of his long-time friend and associate, Jack Pieh, by Vern Viers, a manager who was transferred to Monroe Street from another store. From time to time, Viers brought in employees from his former location to work at Monroe Street, thereby diminishing the overtime opportunities of employees at the Monroe Street Meat Department, including but not limited to

Nebb. Nebb stated without contradiction that all of the Meat Department employees at the Monroe Street were union supporters.

The fact that other employees were brought in to work at the Monroe Street Meat Market from time to time by the Respondent means that the predictable effect of such assignments resulted from deliberate action on the part of the Respondent, not from chance or from unplanned fluctuations in the work load. The record is barren of any explanation for this revised personnel practice other than the one suggested by Nebb, namely that he and other union supporters at Monroe Street were being punished for their known union sympathies. This explanation is made quite plausible by the heavy-handed demonstrations of animus exhibited by the Respondent on other occasions. Accordingly, I conclude that, by reducing Nebb's hours of work, the Respondent herein violated Section 8(a)(1) and (3) of the Act.

e. Restrictions on Picnic Guests

There is no factual dispute that, in previous years, employees attended the annual company picnic for a nominal charge and were free to bring family members and guests without any stated limitations or advance screening. In 1980, two employees sought to invite union representatives to attend as their guests and were rebuffed. A system had been devised whereby purchasers of tickets to the outing had to state in writing in advance the names of guests they wished to invite. When the names of union organizers were found on the lists submitted by Miss Lemble and Miss Shultz, tickets were withheld. These employees were told that the reason for the Respondent's action was that it blamed union organizers for misconduct at the Central Avenue

store and did not want them to attend the picnic. While the right to invite guests to an annual social event was a nominal fringe benefit, it was still part of the terms and conditions of employment at the Respondent's stores. When this benefit was withdrawn in order to insulate employees from social contacts with union representatives, the Respondent violated Section 8(a)(1) and (3) of the Act.

f. Refusal of a Leave of Absence to Marci Zielinski

The record establishes that, prior to 1980, the Respondent followed a practice of granting leaves of absence to summer employees who left for college in September, thereby assuring them of employment when they returned home at Christmastime. The advantage to employees of assured Christmas employment is obvious and the policy had advantages for the Respondent as well, inasmuch as it assured the Respondent not only of extra help during its holiday rush but the availability of experienced employees during this season. Miss Zielinski, a known union sympathizer, wished to take advantage of this policy in 1980 and made repeated requests to obtain such a leave. On each occasion, she was instructed to fill out a form which was never furnished. I have credited her testimony that she was finally told by Kennedy that the Company had discontinued the policy of giving leaves of absence to summer employees permitting their return at Christmastime and that, if she wanted Christmas employment, she would have to apply at or near the date she wanted to come back to work and, in effect, take her chances with other applicants who were interested in coming to work at that time. He stated that the reason for this change in policy was the union organizing campaign. When Miss Zielinski was denied a

leave of absence and, in effect, denied reemployment, the Respondent violated Section 8(a)(1) and (3) of the Act. Miss Zielinski became a discriminatee as of that moment. The fact that the discrimination might not have been limited to her and may have flowed from the implementation of a discriminatory general policy is immaterial to this finding. Nor is it material to the finding that six other summer employees were rehired upon application in December, while Miss Zielinski did not make such an application. If it has any relevance at all, Miss Zielinski's failure to make what, in essence, is a second application for Christmas employment bears only upon the amount of back pay to which she might be entitled.

g. The Evaluation of Marilyn Feeback and the Reduction in Her Hours

In July, 1980, Glauser gave known union supporter Marilyn Feeback a wholly unsatisfactory rating on her personnel evaluation sheet—a zero on a scale of ten—for loyalty. He explained to her that the fact that she had attended union meetings contributed to this evaluation. A possible effect of such an evaluation could have been to place her future employment with the store in jeopardy. Accordingly, it amounts to a discrimination in hire or tenure aimed at discouraging union activity and violates Section 8(a)(1) and (3) of the Act. The fact that the illegal entry was later removed does not detract from this finding, inasmuch as it is well settled that the discontinuance of an unfair labor practice is not a defense to the entry of a Board order.[24]

[24] *N.L.R.B. v. Mexia Textile Mills*, 339 U.S. 563 (1950); *Bandag, Inc.*, 225 NLRB 72, enf. 583 F.2d. 765 (5th Cir., 1978).

A few weeks later, the Respondent reduced Miss Feeback's hours by one full day each week. The record is indistinct as to how the reduction in her hours compared with reductions in the hours of other Flower Center employees, although there is no contradiction in the record for Glauser's assertion that all Flower Center employees received reduced hours. One unanswered question is why a large store with a considerable turnover made no effort to provide these clerks with additional hours in other departments when cut backs took place at the Flower Center. An inference can be drawn from Dombrowski's testimony that a greater impact from this reduction fell upon Miss Feeback than upon other employees, since care was taken not to reduce the hours of full-time employees in the Flower Center to the point where they would no longer be eligible for medical insurance and other fringe benefits.

Miss Feeback was a known union supporter. In September, 1980, when her hours were cut by one day per week, she had already been subject to one discrimination in the form of a poor evaluation. Glauser once told Winans that, if the union came in, he might have to cut back his staff from four employees to two. While this statement might arguable be prediction rather than a threat, it illustrated the tenor of his thinking. No objective standard was suggested or established by the Respondent as the basis upon which it cut Miss Feeback's hours in the amount they were cut. Accordingly, in light of this evidence and the strong animus established elsewhere in the record, I conclude that, by cutting Miss Feeback's hours of work in September, 1980, the Respondent herein violated Section 8(a)(1) and (3) of the Act.

h. The Discharge of William Winans

Winans was a union sympathizer whose support was both voluble and conspicuous. He handbilled the store, attended meetings, wore a union button to work, and engaged in a lengthy discussion with his supervisor in which he told her that nothing she could say could change his mind about supporting the union. In the mind of a discriminatory employer, such an employee is a prime candidate for removal, especially if he is a short-term employee.

The basis for the discharge of Winans was three write-ups in two weeks for manifestly petty misdeeds. He was detained by a supervisor, Glauser, during his break because Glauser wanted to discuss the union campaign and was thereafter written up for returning late to the job. He parked his car in the wrong part of the store parking lot, but instead of asking him to move his car, the Respondent left the car where it was and gave Winans a write-up instead. The third and final infraction which led to his termination was that he was talking with another employee while bagging a large grocery order and evidently did not see a customer who was being checked out at the next register. No one called his attention to the customer's need for assistance when the event was occurring nor is there any rule, practice, or custom which says that employees at the Respondent's store may not talk with each other while working. Moreover, there is no evidence that he was not, in fact, working while talking to Miss Zielinski and it is difficult to see how he could be bagging groceries at two different locations at the same time. This was at most a trivial oversight, one which was too insignificant to bring to his attention while it was occurring so it could be rectified if necessary but important enough to be the subject of a

terminal disciplinary action. Since the Respondent was able to collect three of these write-ups during Winans' probationary period, all of which arose after his union sentiments became known, the Respondent felt that there was a technical basis for Winans' discharge and he was fired.

Winans' discharge is a classic pretext case. The Board has said many times that it is motivation, not justification, which determines the legality of a discharge, because there is hardly a case in which some kind of justification, however strained or tortured, cannot be found to support an employer's action in terminating an employee. In this case, there is little doubt that, but for Winans' union enthusiasm, the pecadillos which found their way into disciplinary write-ups would have passed without notice or would have been corrected on the spot. If an employer who wishes to reserve parking spaces in front of the store for its customers prefers to discipline an employee for illegal parking and does not even ask him to move his car, it is clear that it was much more interested in punishment than in parking spaces. If an employer insists on writing up an employee for failing to bag a customer's groceries but fails to tell him, while the customer is waiting, that he should stop talking and assist the customer, it is equally clear that the employer was more interested in punishment than in servicing its check-out counter. Such is the case presented in this record relating to William Winans. Accordingly, when the Respondent discharged Winans, it do so to discourage his membership in, and support of, the Union and violated Section 8(a)(1) and (3) of the Act. I so find and conclude.

i. The Discharge of Rebecca Donnelly

The discharge of Rebecca Donnelly presents the closest of the three discharge cases because, unlike Winans and Doll, Miss Donnelly was not a leading supporter of the union and confined her union activities to signing a card and attending a meeting or two. She was initially reluctant to sign a card and put off doing so. The Act does protect casual union supporters as well as zealous ones and credible evidence supports a finding that Respondent was aware of Miss Donnelly's union sympathies because she told Carr she had signed a card.

While the Respondent now states that Miss Donnelly was discharged for insubordination growing out of an incident occurring on the midnight shift of February 16-17, 1980, it is not at all clear that it treated the termination as such when it occurred. Carr discussed with Miss Donnelly in detail the fact that the Respondent was closing down the midnight shift in her department and I credit her testimony that he offered to provide her with a reference for other employment. He left her with the impression that she was being laid off for an indefinite period of time, not that she was being discharged for misconduct. It is established that she received a week's pay upon her termination and, in light of the stated policy in the Employer's Handbook that employees fired for insubordination forfeit accrued vacation pay, I discredit the explanation that the money in question represented vacation pay. In general, employees discharged for cause are not given severance pay, although such sweeteners are not uncommon in cases of layoff or in situations when an employer wishes simply to ease an employee off the payroll because a sticky situation has arisen. I credit Miss Donnelly's statement that Carr told her she would be eligible for unemployment compensation, an entitlement she could

not enjoy immediately if she was being discharged for cause. The supervisor most concerned with Miss Donnelly's abrupt behavior made no recommendation to terminate her nor was he even consulted about the decision. In fact, all that he wanted when he wrote up Miss Donnelly was that some other supervisor speak to her and straighten her out. He was unsure even at the time of the hearing why it was that she was terminated.

There is no doubt that Miss Donnelly was insubordinate with Charles Spitler on her final night of work, and there is likewise no doubt that the incident, minor though it was, arose in substantial part because of a close personal relationship between the two individuals which had recently been severed. I believe that the Respondent eased out Miss Donnelly because it did not want a repeat of a personal incident which occurred and felt, perhaps with some justification, that another spat between the lovelorn might take place if Miss Donnelly were allowed to remain on the Respondent's payroll. While this might be no way to treat a lady, it does not amount to a violation of law which this Agency can remedy. Accordingly, I would dismiss so much of the Amended Complaint which alleges that Rebecca Donnelly was discharged in violation of Section 8(a)(1) and (3) of the Act.[25]

3. The Respondent's Refusal to Bargain in the Warehouse Unit

The Union made a demand for recognition with respect to the Warehouse Unit on or about March 10, 1980. The Respondent refused the demand and insisted

[25] Miss Donnelly handbilled the store on the day following her termination and got a well-publicized job at a unionized store. However, this is all post-discharge activity and can have no bearing on the moving cause behind her removal.

upon an election. At the time there were five employees in the unit and all five had signed designation cards which they later authenticated at the hearing in this case. Respondent's counsel admitted that the Respondent had no doubt as to the Union's majority status, as indeed he could not, since that status had been already demonstrated in open court. Accordingly, any insistence on an election to reaffirm or redemonstrate that status is at best an unnecessary imposition.

In 1969, the Supreme Court declared in *Gissel Packing Company, supra,* that the Board may issue a bargaining order in lieu of directing an election in cases where an employer's unfair labor practices are so serious that a fair and free election cannot be held. In the period of time which has elapsed since *Gissel,* this approach to remedying serious unfair labor practices has been repeatedly applied both by the Board and the courts. *N.L.R.B. v. Medley Distilling Company,* 453 F.2d. 374 (6th Cir., 1971); *N.L.R.B. v. Sullivan Electric Company,* 479 F.2d. 1270 (6th Cir., 1973); *N.L.R.B. v. Scott-Gross Company,* 477 F.2d. 64 (6th Cir., 1973); *Litton Business Systems, Inc. v. N.L.R.B.,* 497 F.2d. 262 (6th Cir., 1974).

The employees in the unit in question were threatened with loss of their jobs, coercively interrogated, solicited for grievances, and subjected to the sight of one of their members being discharged for union activities. Such conduct alone would warrant the issuance of a *Gissel* remedy. The other unfair labor practices found in this case—some of them applicable throughout the Respondent's system and others a matter of individual misconduct toward employees at two of the

Respondent's four stores—serve only to confirm this recommendation and to emphasize a violation of Section 8(a)(1) and (5) of the Act.[26]

Upon the foregoing findings of fact, and upon the entire record herein considered as a whole, I make the following:

II. Conclusions of Law

1. Respondent Churchill's Supermarkets, Inc., is now and at all times material herein has been engaged in commerce within the meaning of Section 2(2), 2(6), and 2(7) of the Act.

2. United Food and Commercial Workers International Union, AFL-CIO-CLC, Locals 954 and 626 are labor organizations within the meaning of Section 2(5) of the Act.

3. All regular full-time and part-time employees employed at the Respondent's Toledo, Ohio, warehouse, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act are a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since on or about March 10, 1980, United Food and Commercial Workers International Union, AFL-CIO-CLC, Locals 954 and 626, have been the exclusive

[26] Respondent challenges here, as he did in the representation case, that a single-store or single-unit bargaining unit is appropriate. It is well-established in the retail trade that a single-store unit is presumptively appropriate. *Haag Drug Company, Inc.*, 169 NLRB 877. There is nothing in the record before me which would overcome this presumption, and there was apparently nothing in the record of the representation cases (which are not before me) to lead the Regional Director and the Board to a contrary conclusion. See also *Gray Drug Stores*, 197 NLRB 924.

collective bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law Number 3 for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain collectively with the above-named unions as the exclusive collective bargaining representative of its employees employed in the bargaining unit found appropriate in Conclusion of Law Number 3 above, the Respondent violated Section 8(a)(5) of the Act.

6. By discharging Richard Doll and William Winans; by reducing the hours of Clyde Nebb; by forbidding employees from inviting guests to the annual company picnic; by refusing to grant a leave of absence to Marci Zielinski; by giving Marilyn Feeback an unfavorable personnel evaluation and by reducing her hours of work, all because they were members of or active on behalf of the Union herein, the Respondent violated Section 8(a)(3) of the Act.

7. By the acts and conduct recited above in Conclusions of Law Number 5 and 6; by soliciting grievances from employees for the purpose of providing remedies; by threatening employees with discharge with the closing of the warehouse; by threatening layoffs in the event of unionization; by stating that the Respondent would never give the Union a contract and would thus provoke a strike; by coercively interrogating employees on several different occasions concerning their own union sentiments and activities and the union sentiments and activities of other employees; by creating in the minds of employees the impression that their union activities were the subject of company surveillance; by threatening unfavorable changes in working conditions in the event of unionization; by

telling employees that leaves of absence had been discontinued because of the union organizing drive; by threatening to reduce the size of a work section in the event of unionization; by threatening to discontinue the practice of granting days off and work schedule readjustments in the event of unionization; by promising unstated benefits if the union lost the election; by photographing employees as they were picketing; by imposing and enforcing an overly broad no-solicitation rule; and by granting improvements in medical insurance and other related benefits in order to dissuade employees from supporting the union, the Respondent herein violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(2), 2(6), and 2(7) of the Act.

III. Remedy

Having found that the Respondent herein had engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions which are designed to effectuate the purposes and policies of the Act. Because the independent violations of Section 8(a)(1) of the Act found herein are repeated and pervasive, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. I will recommend that the Respondent be required to reinstate Richard Doll and William Winans to their former or substantially equivalent positions, that it be required to reinstate the working hours which have been discriminatorily cut from the work week of the employees involved in this case,

and that it make whole all of the discriminatees for any loss of earnings which they have sustained by reason of the discriminations practices against them, in accordance with the *Woolworth* formula[27], with interest thereon at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. *Olympic Medical Corporation*, 250 NLRB 146; *Isis Plumbing & Heating Company*, 138 NLRB 716. I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recommended;[28]

ORDER

Respondent Churchill's Supermarkets, Inc., and its officers, agents, supervisors, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities and the union activities of other employees.

(b) Threatening to close the warehouse, discharge employees, reduce portions of the Respondent's operations, impose more ornerous

[27] *F. W. Woolworth Company*, 90 NLRB 289.

[28] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

working conditions, or discontinue employee benefits if the employees select the union as their bargaining agent.

(c) Telling employees that the Respondent would refuse to enter into a contract with the Union if it was selected as their bargaining agent.

(d) Soliciting grievances from employees for the purpose of remedying them.

(e) Creating in the minds of employees the impression that their union activities are the subject of company surveillance.

(f) Promising employees unstated benefits if they reject the union as their bargaining agent.

(g) Forbidding employees from bringing guests who are union representatives or supporters to the annual company picnic.

(h) Imposing and enforcing an overly broad no-solicitation rule.

(i) Granting improvements in medical and other insurance benefits in order to dissuade employees from supporting the union; provided that nothing herein shall be construed to require the Respondent to discontinue or reduce any employee benefits which are currently being provided.

(j) Discouraging membership in and activities on behalf of United Food and Commercial Workers International Union, AFL-CIO-CLC, Locals 954 and 636, or any other labor organization by discharging employees, reducing their hours of employment, giving them unfavorable personnel evaluations, refusing to grant leaves of absence, forbidding them

from inviting guests to the annual company picnic, or otherwise discriminating against them in their hire or tenure.

(k) Refusing to recognize and bargain collectively with United Food and Commercial Workers International Union, AFL-CIO-CLC, Locals 954 and 626, as the exclusive collective bargaining representative of all of the regular full-time and part-time employees employed at the Respondent's Toledo, Ohio, warehouse, exclusive of office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(l) By any other means in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Recognize and upon request bargain collectively with United Food and Commercial Workers International Union, AFL-CIO-CLC, Locals 954 and 626, as the exclusive collective bargaining representative of all of the regular full-time and part-time employees employed at the Respondent's Toledo, Ohio, warehouse, exclusive of office clerical employees, guards, and supervisors as defined in the Act.

(b) Offer to Richard Doll and to William Winans full and immediate reinstatement to their former or substantially equivalent employment without prejudice to their seniority or to rights previously enjoyed, and restore to Clyde Nebb the hours of employment which he previously enjoyed,

and make them and Marci Zielinski and Marilyn Feeback whole for any loss of pay or benefits which they have suffered by reason of the discriminations found herein, in the manner described above in the section entitled "Remedy."

(c) Expunge from employee personnel records any entries which reflect discriminatory treatment found herein.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll and other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Post at the Respondent's warehouse and stores in and about Toledo, Ohio, copies of the attached notice marked "Appendix."[28] Copies of said notice, on forms provided by the Regional Director for Region 8, shall be posted immediately upon receipt thereof and shall be maintained by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 8, in writing, within 20 days from the receipt of this Order what steps the Respondent has taken to comply herewith.

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[28] In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that, insofar as the Amended Complaint alleges matters which have not been found herein to be violations of the Act, said allegations are hereby dismissed.

Dated, Washington, D.C., August 18, 1981.

/s/ WALTER H. MALONEY, JR.
Administrative Law Judge

APPENDIX

WE WILL NOT discharge employees, reduce their hours of employment, forbid them from bringing union representatives to the annual company picnic, refuse to grant leaves of absence, or otherwise discriminate against them for the purpose of discouraging their membership in or activities on behalf of UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCALS 954 AND 626, or any other labor organization.

WE WILL recognize and, upon request, bargain collectively in good faith with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCALS 954 AND 626, as the exclusive collective bargaining representative of our regular full-time and part-time warehouse employees, exclusive of office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any other manner or by any means interfere, with restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act. These rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid and protection.

WE WILL OFFER full and immediate reinstatement to their former or substantially equivalent positions RICHARD DOLL and WILLIAM WINANS, WE WILL restore the working hours formerly enjoyed by CLYDE NEBB, and WE WILL make them and other employees

whole for any loss of earnings they have suffered by reason of the discriminations practiced against them, with interest.

WE WILL expunge from our personnel records any entries which reflect discriminatory treatment of employees.

CHURCHILL'S SUPERMARKETS, INC.
(Employer)

Dated _____ By _____ _____
(Representative) (Title)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

CHURCHILL'S SUPERMARKETS, INC., IS POSTING THIS NOTICE TO COMPLY WITH AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, WHICH WAS ISSUED AFTER A HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE IN A CASE IN WHICH WE WERE FOUND TO HAVE VIOLATED CERTAIN PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT.

WE WILL NOT coercively interrogate employees concerning their union activities or the union activities of other employees.

WE WILL NOT threaten to close the warehouse, discharge employees, reduce portions of our operation, impose more ornerous working conditions, or discontinue employee benefits if employees select the Union as their bargaining agent.

WE WILL NOT tell employees that we will refuse to enter into a contract with the Union if it is selected as the bargaining agent of our employees.

WE WILL NOT solicit grievances from employees for the purpose of remedying them.

WE WILL NOT create in the minds of our employees the impression that their union activities are the subject of company surveillance.

WE WILL NOT promise employees unstated benefits if they reject the Union as their bargaining agent.

WE WILL NOT impose or enforce an overly broad no-solicitation rule.

WE WILL NOT forbid employees from bringing to the annual company picnic guests who are union representatives.

WE WILL NOT grant improvements in medical and other insurance benefits for the purpose of persuading employees not to support the Union.

DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

(Dated July 31, 1987)

Cases 8—CA—13944—1
8—CA—13944—2
8—CA—14243—1

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHURCHILL'S SUPERMARKETS, INC.,

and

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL—CIO—CLC, LOCALS 954 AND 626.

DECISION AND ORDER

On 18 August 1981 Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

(Footnote continued on following page.)

modify his remedy,[2] and to adopt the recommended Order as modified and set out in full below.

The Alleged 8(a)(1) Violations

The judge found that the Respondent had violated Section 8(a)(1) of the Act by coercively interrogating several employees. The Respondent excepted to these findings, arguing that an examination of the surrounding circumstances in each case indicates that the conversations at issue were not coercive and did not violate the Act. We agree with the Respondent only with respect to the alleged interrogations of employee Curtis by Supervisor Katt and employee Winans by Supervisor Petree.

Christine Curtis works as a waitress in the coffeeshop at the Monroe Street store. At the time of the union organizing campaign in 1980,[3] she was supervised

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(Footnote continued from preceding page.)

We agree with the judge's conclusion that the Respondent violated Sec. 8(a)(3) by denying employee Zielinski a leave of absence for antiunion reasons. In so doing, however, we disagree with the judge's reasoning that the denial of a leave of absence was tantamount to a denial of reemployment. Instead, we find that the Respondent's conduct was violative of Sec. 8(a)(3) because it placed Zielinski in a different employment status for unlawful reasons.

In agreeing with the judge's conclusion that the Respondent violated Sec. 8(a)(3) by giving an unfavorable evaluation rating to employee Feeback in retaliation for her union activities, we note that the Respondent's subsequent improvement of Feeback's rating was insufficient to constitute an effective repudiation of its earlier unlawful conduct or to relieve the Respondent of liability for it. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1970).

[2] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after 1 January 1987 will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. §6621. Interest on amounts accrued prior to 1 January 1987 shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[3] All dates refer to 1980 unless otherwise indicated.

by Juanita Brown Katt. Curtis wore a union button at all times and made no secret of her support. Both Curtis and Katt testified that during the course of Curtis' employment they had several conversations in which they discussed the Union, as well as Curtis' personal problems. On occasion, Katt asked Curtis why she was in favor of a union and why she thought a union was necessary. At one point, Katt observed to Curtis that perhaps one of the reasons the Union appealed to Curtis was the fact that it gave her a new group of friends.

The judge found that Katt's inquiries to Curtis concerning the Union were coercive. We disagree. The personal nature of the relationship between Curtis and Katt and the friendly tone of their conversations support the Respondent's assertion that Katt's questions were not coercive, particularly in view of Curtis' position as an open and ardent union supporter. Therefore, we cannot agree with the judge that Katt's questions to Curtis about the Union violated the Act. See *Rossmore House*, 269 NLRB 1176 (1984).

Employee William Winans worked at the Monroe store as a carryout and front-end employee. He was a known union supporter, who wore a union button at the store and had engaged in handbilling on behalf of the Union. In March, Supervisor Joyce Petree asked several of the front-end employees if they had any questions about the Union. When she asked Winans, he replied in the affirmative, and they engaged in a 30-minute discussion about the Union. Winans testified that he began the conversation by telling Petree that he was in favor of the Union and that she would not change his mind by talking to him about it. During the course of the conversation, Winans asked several questions Petree could not answer. She later brought Executive Senior

Vice President and Director of Operations Richard Geerkin and Store Manager Thomas Dombowski to the front end of the store and asked Winans in their presence whether he had any questions to address to them. He asked one question, and the conversation ended. The judge found that Petree's actions violated the Act by pointing him out to the Respondent's top management as a union activist and by interrogating him. We disagree. Winans was an open union supporter whose sentiments were not hidden from Respondent's management. There is no evidence that Petree specifically identified Winans as an organizer or an activist. Rather, she was attempting to provide a source of answers to Winans' questions. In these circumstances, we cannot agree with the judge that the conversation between Winans and Petree was coercive. *Rossmore House, supra.*

With respect to the interrogations of employees Winans and Joseph Wielgopolski by Flower Shop Manager Richard Glauser and of employee Clyde Nebb by Supervisor Jack Pieh, we agree with the judge that these conversations were coercive. In so finding, we rely on the fact that, although each of the employees questioned was an open union supporter, the conversations between Glauser and Wielgopolski and Glauser and Winans involved threats of layoffs, discharges, and the prediction of a strike because the Respondent would not give the Union a contract. Further, we note that the conversations between Nebb and Pieh involved repeated questioning about the Union, a promise of benefit, and promulgation of an unlawful no-solicitation rule. In each situation these circumstances created a coercive atmosphere aimed at interfering with the employees' exercise of their Section 7 rights.

Rossmore House, supra. Accordingly, we find, in agreement with the judge, that the Respondent violated Section 8(a)(1) by interrogating employees Wielgopolski, Winans, and Nebb.[4]

The judge also found that the Respondent committed several 8(a)(1) violations during the course of employee Nebb's evaluation by Supervisor Pieh in March 1980. During the course of the evaluation, Pieh asked Nebb if he had any complaints. Nebb replied that he had the same ones he had every year, specifically, lack of a retirement plan, wages which were below union scale, and inadequate benefits, particularly health care. Pieh then asked why Nebb was involved with the Union, and stated that although there was nothing that could be done about the wage differential during the Union's organizing campaign, when the "union business" was over, the Company could do something. Pieh concluded by stating that it would be a shock to General Churchill, the Respondent's president and chief executive officer, to see a list of union leaders with Nebb's name at the top.

The judge found that in this conversation the Respondent violated Section 8(a)(1) by interrogating Nebb, creating the impression of surveillance, unlawfully soliciting a grievance and unlawfully promising a benefit. As noted above, the interrogation of an open union supporter is normally not considered coercive unless it is accompanied by unlawful threats or promise of benefits. *Rossmore House, supra.* Here, we find that Nebb was unlawfully questioned about his union sentiments since

[4] We note that in finding the interrogation of Nebb to be unlawful the judge relied on *PPG Industries*, 251 NLRB 1146 (1980), which was overruled by *Rossmore House*. However, because of the coercive circumstances surrounding Pieh's questioning of Nebb, we reach the same result as the judge.

he was at the same time unlawfully promised a benefit when Pieh promised to "do something about" the wage differential when the "union business" was over.

We disagree with the judge's conclusions, however, that the Respondent unlawfully solicited a grievance and created the impression of surveillance. The question to Nebb concerning his complaints was one which would be expected in the normal course of an evaluation. It is evidence from Nebb's answer that he and Pieh had had similar conversations in past years, prior to the Union's organizing campaign. In these circumstances, we cannot find that Pieh's question to Nebb constituted an unlawful solicitation. We also find that since Nebb was an open and vocal union supporter Pieh did not create an impression of surveillance by stating that Churchill would be shocked to see Nebb's name on a list of union leaders. Since Nebb's sentiments and activities were well known facts, no surveillance was involved.

The judge further found that the Respondent violated Section 8(a)(1) by enforcing a discriminatory no-solicitation rule. We agree with the judge that a no-solicitation rule was discriminatorily enforced with respect to Nebb's use of the company telephone on his breaks, and with respect to Supervisor Katt's warning to employee Curtis to refrain from union activity on company time for her own good, for the reasons set forth in the judge's decision. In adopting the judge's finding that the Respondent violated Section 8(a)(1) when Supervisor Katt issued the warning to Curtis "for your own good" to refrain from union activity on company time, we note that the warning was in response to employee Curtis' simple "Hello" to union officials who were lawfully seated as patrons in the Respondent's restaurant. At least absent evidence that the Respondent

had previously warned waitresses against greeting customers, this warning represented antiunion discrimination that would tend to restrain the exercise of Section 7 rights.[5]

We disagree with the judge's conclusion that the Employer's grant of a new health care program to employees was unlawful. As the judge found, beginning in the late summer or fall of 1979, the Respondent began to consider the possibility of discontinuing the use of an outside carrier and, instead, to provide health insurance coverage for its employees through a self-insurance fund. It asked the broker who had provided the Respondent with casualty insurance coverage to investigate this possibility and to provide the Respondent with quotations detailing the cost of the plan and whether it would be possible to increase benefits through self-insurance without an increase in cost to the Respondent. The broker delayed several months, and it was not until late February or early March that it gave the Respondent a quotation for self-insurance. The broker suggested at the time that the Respondent wait a few more weeks before deciding on a plan because he felt that he could obtain better catastrophe coverage from another insurance company. Early in April, the broker presented the Respondent with another quotation, and within a matter of days the Respondent executed the necessary documents to adopt the plan.

[5] While Chairman Dotson agrees with the judge that a no-solicitation rule was discriminatorily enforced with respect to Nebb's use of the company telephone on his breaks, he disagrees with the judge's conclusion that Supervisor Katt's warning to employee Curtis was discriminatory. An employer may lawfully prohibit solicitation during worktime, and there is no indication here that such a prohibition was discriminatorily applied. Further, in view of the personal nature of the relationship existing between Katt and Curtis, the Chairman does not view Katt's comment to Curtis to refrain from union activity on company time "for her own good" as threatening or coercive.

Ronald Murray, an insurance agent for Picton-Cavanaugh, testified that the length of time between the initial indication of interest by the Respondent in August 1979 and the actual implementation of the program in May 1980 was due to a delay on the part of the insurance company, and not on the part of the Respondent. A decision was made by the Respondent to purchase the plan shortly after it was presented in April 1980. The effective date of coverage was 1 May 1980, which coincided with the anniversary of the Respondent's previous health care policy. Murray indicated in his testimony that it is normal practice to change to a new policy on the renewal date of the old one.

Unlike the judge, we do not find that this explanation "strains credulity." The Respondent has established that the timing of the new insurance program resulted from a combination of factors, the insurance company's delay chief among them. Indeed, the judge's statement of the facts indicates that he credited the testimony establishing the Respondent's version of events at least up until the new program was announced. But the judge simply concluded—notwithstanding the logical explanation for the delay—that the "improvements could have been made months or years before the Union's organizing campaign." Where a plausible explanation for the sequence of events is given, the fact that it was theoretically possible for the benefits to be given earlier does not establish discrimination in the timing. Nor do we think that the Respondent was compelled to wait until after the union election to announce and implement the program. It announced the new coverage shortly after the agent had presented the package, and it timed the implementation so that the new coverage would take

effect when the old health insurance policy expired. In short, the Respondent demonstrated that the improvement in benefits represented the logical working out of a plan initiated before the advent of a union campaign, i.e., its proof indicates that the timing of the implementation of new benefits would have been the same whether or not there was a campaign afoot. In these circumstances, the fact that the Respondent committed other unfair labor practices does not render this grant of benefits unlawful. Accordingly, we do not adopt the judge's finding of a violation on this allegation.

The judge also found that the Respondent had violated Section 8(a)(1) through Supervisor Pieh's statements to employee Shelia Lemble that if the Union came in, the employees would be subject to more onerous working conditions. We agree with this finding, but note that the judge neglected to mention that during the same conversation Pieh told Lemble that if the Union did not come in, she would have a "good, healthy raise" within a year. We find that this statement constitutes an unlawful promise of benefit and is also violative of Section 8(a)(1).

The Alleged 8(a)(3) Violations

The judge found that the Respondent had violated Section 8(a)(3) by reducing the number of overtime hours worked by employee Nebb by approximately 1.4 hours per week. The Respondent asserts that the fluctuation in hours was due to the fact that an employee from the meat department at the Monroe store where Nebb worked was transferred to a new store, which created additional overtime. When individuals were later temporarily assigned to the Monroe store to assist, the result was that the opportunity for overtime was reduced. We find merit in the Respondent's position.

As noted above, Nebb was an open union supporter. Nebb testified without contradiction that all the employees in the meat department were also in favor of the Union. The reduction in hours coincided with the transfer of Meat Department Supervisor Pieh to a new store. A supervisor from another store, Vern Viers, replaced him, and from time to time would bring his former employees to the Monroe store to work. The judge concluded that the record is devoid of any explanation for this practice other than discrimination against the union supporters in the meat department at the Monroe store. We disagree. Nebb's testimony indicates that in January one of the regular meatcutters was transferred to a different store, which resulted in 2 to 6 hours of overtime for the remaining employees. In June when Viers became manager, employees from other stores would come into the Monroe store and work for a few hours a week. Although there is no clear explanation as to why outside help was sought rather than continuing to give overtime to Monroe store employees, there also has been no evidence presented, other than reference to the Respondent's unlawful conduct generally, that would indicate that the change was discriminatorily motivated. Contrary to the judge, we cannot conclude that discrimination is the only explanation. It is not unusual for new managers to change personnel practices to meet their own preferences. Further, Nebb's overtime hours were only cut by 1.4 hours a week, and there were some pay periods after Viers arrived in which he worked as much as 50 hours. These facts tend to offset an inference of discrimination. Without more, we decline to find that the reduction of Nebb's overtime hours violated the Act.

The judge also found that the Respondent committed an 8(a)(3) violation by refusing to allow nonemployee union representatives to attend its annual company picnic. The Respondent excepts, maintaining that it was justified in refusing to grant tickets to union representatives, given the nature of the picnic and the fact that the decision was not based on its employees' union sentiments. We find merit in the Respondent's exception. The annual picnic was essentially a family-style affair. The Respondent provided all refreshments, and charged only a nominal $1 fee to cover the cost of the fried chicken. The purchase of a ticket in advance was required for the 1980 picnic, as was the submission of an employee guest list. Employees Penny Shultz and Shelia Lemble turned in the names of certain union representatives as their guests, but were eventually told that the union representatives were not welcome. One supervisor told Lemble that the reason union representatives were not welcome was because of their involvement with another Churchill's store which was being organized. The employees were never denied an opportunity to buy tickets for themselves. The judge determined that while the right to invite guests to attend an annual social function was a nominal fringe benefit it was still a term and condition of employment, and that benefit had been unlawfully withdrawn. We disagree that the evidence established that the Respondent's conduct was discriminatory.

In the past, the company picnic had been held for the benefit of employees, their families, and close friends. Penelope Shultz testified that employees brought their families to the picnic and that they were entitled to bring a date. She also testified that she had never attended any of the company picnics in the past. She had no

intention of going to the picnic for which she requested tickets for the union guests, but requested them "just to see if I could get them."

The Respondent did not prohibit its employees from attending the picnic, nor did it deny them the right to bring guests in general. Rather, the Respondent objected to the inclusion of certain guests who in all likelihood would have used this friendly social gathering for a purpose for which it was not intended, namely, to conduct business in the form of promoting their own interest. Based on the record evidence, it would be erroneous to conclude that the Employer acted discriminately in refusing to permit guests to attend who did not fit into the category of "family or friends" and who were coming for a purpose other than the one intended. The Respondent is under no obligation to include nonemployee union representatives at its annual picnic, so long as it does not discriminate against employees on the basis of their union sentiments in the process. Here, no such discrimination took place, and we find that the judge erred in concluding that the Respondent violated Section 8(a)(3) and (1).

During the union organizing campaign, employee Marilyn Feeback was employed in the Respondent's flower shop at the Monroe store. The judge found that the Respondent violated Section 8(a)(3) and (1) by reducing Feeback's hours by 1 full day. The Respondent excepts, and contends that its actions are not violative since all of the flower center employees' hours were reduced because of economic considerations. We find merit in the Respondent's exception.

Feeback worked for the Respondent from November 1978 to October 1980. It appears from the record that prior to February 1980 she worked Mondays, Thursdays, and Fridays from 10 a.m. until 5 p.m. and every other

Sunday from 12 p.m. until 4 p.m. In February 1980, the Employer added an extra workday on Wednesday to her schedule because "a couple of girls" quit. After Feeback returned from her father's funeral on 15 September, the Employer reduced her hours by 1 hour on Monday, Thursday, and Friday, and no longer scheduled her to work on Wednesdays.

The record is unclear as to how the reduction in Feeback's hours compared with the reductions in the hours of other flower department employees. However, the judge credited Glauser's assertion that all flower center employees received reduced hours. While the full-time employees' hours were not reduced as much as the part-time employees, their hours were also cut. Given the evidence before us, we are unable to determine whether the reduction in Feeback's hours was discriminatory, and therefore conclude that the General Counsel failed to establish that the reduction of Feeback's hours violated Section 8(a)(3).

The Alleged 8(a)(5) Violation

We agree with the judge that a bargaining order is warranted in the Respondent's warehouse unit, where all five employees had signed authorization cards as of 10 March 1980.[6] The Respondent's unlawful conduct was

[6] Although we agree with the judge's grant of a bargaining order, we expressly disavow his statement that since the Union had demonstrated its majority status in open court the Respondent's insistence on an election was an "unnecessary imposition." It is well settled that, where an employer has not committed any unfair labor practices, an employer does not violate Sec. 8(a)(5) of the Act by refusing to voluntarily recognize a union on the basis of a card majority, absent an expressed agreement to do so. *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974). In the present case, the Employer contends not only that a bargaining order is inappropriate, but that it has not violated the Act by its actions. Were this found to be true, an election would be appropriate at the Employer's request, despite the Union's card majority.

extensive and pervasive at both the Monroe store and the warehouse, but the effects of the unfair labor practices in the warehouse unit are particularly noteworthy, given the extremely small size of the unit. In determining whether a bargaining order is appropriate, the Board examines the seriousness of the violations committed and the present effects of the coercive practices. In the warehouse unit, the Respondent immediately embarked on a campaign involving "hallmark" violations of the Act designed to discourage union support among its employees.

Upon learning of the involvement of warehouse employees Richard Doll and Keith Mallory in the handbilling of Churchill's Central Avenue store on 19 February, the Respondent called an employee meeting. At the meeting on 20 February, Warehouse Supervisor Ron Shook and Warehouse Manager Judy Faust asked Mallory and Doll what their problem was. They replied that they wanted representation. Shook stated that they should have sought to have their problems resolved without intervention from a third party. In the discussion that followed, Faust and Shook told the employees that they were very disappointed in their actions. Shook also told the employees that if the Union came in he would close the warehouse, and that the employees would be out of jobs and ineligible for unemployment compensation. During the meeting, employee Charles Tucker complained that his status should be converted from part time to full time, so that he could receive health insurance and other benefits. Faust replied that the Company already had too many full-time people and that it would be too expensive to give him hospitalization coverage.

A second meeting was held a few days later with Richard Geerkin in attendance.[7] Tucker reiterated his complaint concerning his part-time status, and Geerkin said he would check into it. Another employee complained about the lack of a regularly scheduled lunch hour. Shortly thereafter, a new work schedule was posted with a regularly scheduled lunch hour, and Tucker was classified as a full-time employee. On 10 March the Union requested recognition based on its card majority. The Respondent declined to extend recognition, and insisted on an election. On 26 March Richard Doll was discriminatorily discharged.

It is significant to our decision to note the seriousness of these violations. In the course of 5 weeks, the warehouse employees were threatened with plant closure, had their grievances solicited and remedied by top management, and saw one of their coworkers discharged for his union activity. These actions involve the type of pervasive coercion which has lingering effects not readily dispelled. Because of the swiftness and severity of the Respondent's reaction against the Union's organizing drive, it is highly unlikely that a fair election could be conducted with the use of only traditional remedies. We note that the Sixth Circuit has recognized that a cease-and-desist order is not always sufficient to remedy an employer's unfair labor practices. *Exchange Bank v. NLRB*, 732 F.2d 60 (6th Cir. 1984). Therein, the court quoted *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), as follows:

> If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see

[7] Geerkin is the Respondent's executive senior vice president and director of operations.

> no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.

We believe that, under the circumstances of the instant case, simply requiring the Respondent to refrain from unlawful conduct will not eradicate the lingering effects of the hallmark violations, and will not deter their recurrence.

We are mindful that 7 years have passed since the occurrence of the unlawful conduct in the warehouse unit. The serious nature of the Respondent's conduct in threatening plant closure, soliciting grievances, and discharging a union supporter, however, convinces us that the lasting effects of such conduct cannot be remedied either by the passage of time or the Board's traditional remedies. The passage of time, though regrettable, is not a sufficient basis for denying the bargaining order.[8] Accordingly, we adopt the judge's recommended Order, as modified below, and require the Respondent to bargain with the Union as the duly designated representative of the employees in the warehouse unit, effective 10 March 1980, the date the Union had acquired authorization cards from a majority of employees in the unit.

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[8] *Quality Aluminum Products*, 278 NLRB No. 49 (Jan. 31, 1986), enfd. 813 F.2d 795 (6th Cir. 1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Churchill's Supermarkets, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities and the union activities of other employees.

(b) Threatening to close the warehouse, discharge employees, reduce portions of the Respondent's operations, impose more onerous working conditions, or discontinue employee benefits if the employees select the Union as their bargaining agent.

(c) Telling employees that the Respondent would refuse to enter into a contract with the Union if it was selected as their bargaining agent.

(d) Soliciting grievances from employees for the purpose of remedying them.

(e) Creating in the minds of employees the impression that their union activities are the subject of company surveillance.

(f) Promising employees benefits if they reject the Union as their bargaining agent.

(g) Imposing and enforcing an overly broad no-solicitation rule.

(h) Discouraging membership in and activities on behalf of United Food & Commercial Workers International Union, AFL-CIO-CLC, Locals 954 and 626, or any other labor organization, by discharging

employees, giving them unfavorable personnel evaluations, refusing to grant leaves of absence, or otherwise discriminating against them in their hire or tenure.

(i) Refusing to recognize and bargain collectively with United Food & Commercial Workers International Union, AFL-CIO-CLC, Locals 954 and 626, as the exclusive collective-bargaining representative of all the regular full-time and part-time employees employed at the Respondent's Toledo, Ohio warehouse, exclusive of office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with United Food & Commercial Workers International Union, AFL-CIO-CLC, Locals 954 and 626, as the exclusive collective-bargaining representative of all the regular full-time and part-time employees employed at the Respondent's Toledo, Ohio warehouse, exclusive of office clerical employees, guards, and supervisors as defined in the Act.

(b) Offer Richard Doll and William Winans immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to the unlawful discharges of Richard Doll and William Winans and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Make Marci Zielinski whole for any loss of pay or benefits which she has suffered by reason of the discrimination found herein.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at the Respondent's warehouse and stores in and about Toledo, Ohio, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that, insofar as the amended complaint alleges matters which have not been found to be violations of the Act, said allegations are dismissed.

Dated, Washington, D.C. 31 July 1987

DONALD L. DOTSON
Chairman

MARSHALL B. BABSON
Member

JAMES M. STEPHENS
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees concerning their union activities or the union activities of other employees.

WE WILL NOT threaten to close the warehouse, discharge employees, reduce portions of our operations, impose more onerous working conditions, or discontinue employee benefits if employees select the Union as their bargaining agent.

WE WILL NOT tell employees that we will refuse to enter into a contract with the Union if it is selected as the bargaining agent of our employees.

WE WILL NOT solicit grievances from employees for the purpose of remedying them.

WE WILL NOT create in the minds of our employees the impression that their union activities are the subject of company surveillance.

WE WILL NOT promise you benefits if you reject the Union as your bargaining agent.

WE WILL NOT impose or enforce an overly broad no-solicitation rule.

WE WILL NOT discharge employees, or otherwise discriminate against them for the purpose of discouraging their membership in or activities on behalf of United Food & Commercial Workers International Union, AFL—CIO—CLC, Locals 954 and 626, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively in good faith with United Food & Commercial Workers International Union, AFL—CIO—CLC, Locals 954 and 626, as the exclusive collective-bargaining representative of our regular full-time and part-time warehouse employees, exclusive of office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL offer Richard Doll and William Winans immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify Richard Doll and William Winans that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

WE WILL make Marci Zielinski whole for any loss of pay or benefits which she has suffered by reason of the discrimination found herein.

CHURCHILL'S SUPERMARKETS, INC.
(Employer)

Dated_____ By _____
(Representative) (Title)

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed November 9, 1988)

No. 87-6064

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHURCHILL'S SUPER MARKETS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

BEFORE: KEITH, KENNEDY and NORRIS, *Circuit Judges*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

APPLICATION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

(Filed August 1, 1988)

Case No. 87-6064

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHURCHILL'S SUPER MARKETS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

APPLICATION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

John G. Mattimoe
Justice G. Johnson, Jr.
Terrance L. Ryan
Marshall & Melhorn
Four SeaGate—Eighth Floor
Toledo, Ohio 43604
Telephone: (419) 249-7100

Now comes the petitioner, Churchill's Supermarkets, Inc., pursuant to Section 10 (e) of the National Labor Relations Act, 29 U.S.C. 160 (e), and applies for leave of this court to adduce additional evidence before the National Labor Relations Board on the issue of the extent and effect of the passage of time from the commission of the alleged unfair labor practices which

are the subject matter of this action and turnover in the employee compliment of petitioner which forms the bargaining unit which the National Labor Relations Board has deemed appropriate.

The Board has asked this court to impose the extraordinary sanction of a bargaining order to redress certain unfair labor practices found by the Board. However, the appropriateness of the bargaining order remedy must be weighed in light of the fact that eight years have transpired since the alleged commission of the subject unfair practices. Further, every employee of petitioner present in its warehouse bargaining unit in 1980 has left the petitioner's employ. Petitioner has twice petitioned the Board to review these facts and reconsider its remedy, but the Board has denied one such request and ignored the second. (Copies of Requests For Reconsideration are attached as exhibits A and B).

Accordingly, pursuant to Section 10 (e) of the National Labor Relations Act, petitioner prays this Court enter an order directing the Board to take additional evidence to be made part of the record of this case and to reconsider its findings and its original order directing a bargain order as the appropriate remedy in this matter. The evidence in question is material as it goes directly to whether a bargaining order remains a viable and effective remedy that will serve the best interests of current employees and promote the policies underlying the federal labor laws. Further, the facts in issue could not have been raised by petitioner in earlier proceedings before the Board since the passage of excessive time is continuing and the complete turnover of the employee compliment occured only as of March, 1988 (See affidavit attached to Exhibit B). Therefore,

petitioner could not have adduced such evidence in the administrative hearing before the Board and, until the present time, the Board could not properly have considered and based its findings on such evidence.

Respectfully submitted,

TERRANCE L. RYAN

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this 29th day of July, 1988 to Mr. Joseph A. Oertel, Esq., National Labor Relations Board, Office of the General Counsel, 1717 Pennsylvania Avenue N.W., Washington D.C. 20570.

/s/ TERRANCE L. RYAN

Exhibit A

Case Nos. 8-CA-13944-1
8-CA-13944-2
8-CA-14243-1

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHURCHILL'S SUPER MARKETS, INC.,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCALS 954 AND 626.

REQUEST FOR RECONSIDERATION

Now comes the respondent, Churchill's Super Markets, Inc., and requests reconsideration of that portion of the Board's order in the above-captioned matter dated July 31, 1987 and reported at 285 NLRB No. 21 which required respondent to recognize and bargain with the charging party for the reason that such order is inappropriate in light of the passage of time from the commencement of proceedings in this matter and the substantial employee turnover which has occurred in the warehouse bargaining unit as indicated in the affidavit of the respondent's Executive Vice President attached hereto. Respondent submits that the imposition of a bargaining order in this matter is unwarranted in light of these factors and requests that

the Board reopen the hearing of this matter and take and consider additional evidence relative to this portion of its remedy.

Respectfully submitted,

/s/ TERRANCE L. RYAN
Attorney for Respondent
Churchill's Super Markets, Inc.

MARSHALL & MELHORN
Four SeaGate—Eighth Floor
Toledo, Ohio 43604
Telephone: (419) 249-7100

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed this 14th day of December, 1987, to Joseph Oertel, Esq., National Labor Relations Board, 1717 Pennsylvania Avenue N.W., Washington, D.C. 20570.

/s/ TERRANCE L. RYAN

Case Nos. 8-CA-13944-1
8-CA-13944-2
8-CA-14243-1

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

CHURCHILL'S SUPER MARKETS, INC.,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCALS 954 AND 626.

AFFIDAVIT OF ROBERT J. CARR, III

I, Robert J. Carr, III, being first duly sworn do hereby depose and state as follows:

1. I am presently Senior Executive Vice-President and Chief Operations Officer of Churchill's Super Markets, Inc.

2. In my capacity as Senior Executive Vice-President and Chief Operations Officer I have responsibility for and first-hand knowledge of the employee compliment at the Company's produce warehouse located at 115 Wabash Street, Toledo, Ohio.

3. Since 1980, there has been substantial turnover at the warehouse such that only 1 out of 5 current employees was employed at the warehouse in 1980. Moreover,

approximately 24 employees have been employed at the warehouse during the period from 1980 to the present.

4. Further affiant sayeth not.

/s/ ROBERT J. CARR, III
Robert J. Carr, III

STATE OF OHIO
COUNTY OF LUCAS } ss:

Sworn to before me and subscribed in my presence this 12th day of December, 1987.

/s/ BRIAN P. BARGER
Brian P. Barger
Attorney at Law
Notary Public—State of Ohio
My Commission does not expire

Exhibit B

Case Nos. 8-CA-13944-1
8-CA-13944-2
8-CA-14243-1

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHURCHILL'S SUPER MARKETS, INC.,

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCALS 954 AND 626.

REQUEST FOR RECONSIDERATION

Now comes the Respondent, Churchill's Super Markets, Inc., and requests reconsideration of that portion of the Board's order in the above-captioned matter dated July 31, 1987 and reported at 285 NLRB No. 21 which requires Respondent to recognize and bargain with the charging party for the reason that such order is inappropriate in light of the passage of time since the commencement of the proceedings in this matter and the fact that, as of this date, no eligible employee present during the events of 1980 remains in the employ of Respondent at its warehouse. The last such employee resigned in early 1988 as is set forth in the affidavit of Respondent's Executive Vice President attached hereto.

Procedural niceties notwithstanding, this change in circumstance warrants reconsideration of the Board's order at this time and Respondent requests that the Board reopen the hearing of this matter and take into consideration additional evidence relative to this portion of its remedy.

Respectfully submitted,

/s/ TERRANCE L. RYAN

Attorney for Respondent
Churchill's Super Markets, Inc.

MARSHALL & MELHORN
Four SeaGate—Eighth Floor
Toledo, Ohio 43604
Telephone: (419) 249-7100

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed this _____ day of _____, 1988, to Joseph Oertel, Esq., National Labor Relations Board, 1717 Pennsylvania Avenue N.W., Washington, D.C. 20570.

AFFIDAVIT OF ROBERT J. CARR, III

I, Robert J. Carr, III, being first duly sworn do hereby depose and state as follows:

1. I am Executive Vice President of Churchill's Super Markets, Inc.

2. In that capacity I have personnel responsibility for the Company's warehouse located in Toledo, Ohio. This warehouse is the facility which is presently subject to a bargaining order imposed by the National Labor Relations Board.

3. No employee who was eligible to vote in the 1980 NLRB elections is still employed at the warehouse. The last to leave was Charles Tucker who resigned effective March 10, 1988 (see copy of resignation attached).

4. The two current employees performing what would be bargaining unit work and who would be eligible to vote in an election conducted by the NLRB were hired in December, 1987 and March, 1988 respectively. The latter employee was hired to replace Charles Tucker.

FURTHER AFFIANT SAITH NOT.

/s/ ROBERT J. CARR, III
Robert J. Carr, III

STATE OF OHIO
COUNTY OF _____ } ss:

Sworn to before me and subscribed in my presence this 1st day of April, 1988.

/s/ TERRANCE L. RYAN
Terrance L. Ryan
Attorney at Law
Notary Public—State of Ohio
My Commission Has No
Expiration Date
Section 14703 O.R.C.

EXCERPT FROM ORAL ARGUMENT OF MR. JOSEPH OERTEL, ESQUIRE, OFFICE OF THE GENERAL COUNSEL FOR THE NATIONAL LABOR RELATIONS BOARD, BEFORE THE SIXTH CIRCUIT COURT OF APPEALS ON AUGUST 5, 1988 IN CHURCHILL'S SUPER MARKETS, INC. V. NATIONAL LABOR RELATIONS BOARD.[1]

Mr. Oertel: May it please the court, my name is Joseph Oertel, counsel for the Labor Board. Regarding the discharge of Richard Doll—

The Court: Before you get to that—

Mr. Oertel: I beg your pardon?

The Court: Before you get to that would you at least explain to this one judge's satisfaction or at least tell why was this inordinate delay here?

Mr. Oertel: This is an unfortunate case your honor where the case just simply fell between the cracks and I—

The Court: Got put in the drawer?

Mr. Oertel: I have no explanation for the delay. It was a very long delay, it was a very regrettable delay. We're sorry that it happened but I think that this case . . . I believe at one time it was assigned to one attorney and that attorney sat on it for a while then that attorney left the Board. Then it was sometime before it was reassigned to another

[1] Transcribed from tape recording made and maintained by the Clerk of the Sixth Circuit Court of Appeals.

lawyer, and after, and after a while, a lawyer on the Board side, legal assistance on the Board side, and as a result there is a huge delay. We regret that it happened. It is very regrettable that it happened, but it's one of those unfortunate cases. In my, in my experience with the Board, I've never seen—this is an unusual situation—I've never seen a case that was delayed this long.

* * *

Supreme Court, U.S.
FILED
APR 7 1989
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No. 88-1317 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHURCHILL'S SUPER MARKETS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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14pp

QUESTION PRESENTED

Whether, in light of petitioner's pervasive coercion of its employees, the court of appeals properly enforced the bargaining order issued by the National Labor Relations Board despite the passage of seven years from the time of the employer's illegal conduct to the issuance of the bargaining order.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	9
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Automated Business Systems v. *NLRB*, 497 F.2d 262 (6th Cir. 1974)	9
Clark's Gamble Corp. v. *NLRB*, 422 F.2d 845 (6th Cir.), cert. denied, 400 U.S. 868 (1970)	6, 9
Impact Industries, Inc. v. *NLRB*, 847 F.2d 379 (7th Cir. 1988)	8
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969)	3, 7
NLRB v. *Koenig Iron Works, Inc.*, 856 F.2d 1 (2d Cir. 1988)	7, 8
NLRB v. *Marion Rohr Corp.*, 714 F.2d 228 (2d Cir. 1983)	8
NLRB v. *Pace Oldsmobile, Inc.*, 739 F.2d 108 (2d Cir. 1984)	9
Quality Aluminum Products, 278 N.L.R.B. No. 49 (Jan. 31, 1986), enforced, 813 F.2d 795 (6th Cir. 1987)	4

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	2, 3, 4, 6
§ 8(a)(3), 29 U.S.C. 158(a)(3)	2, 3, 4, 6
§ 8(a)(5), 29 U.S.C. 158(a)(5)	2, 3, 6
§ 10(d), 29 U.S.C. 160(d)	5
§ 10(e), 29 U.S.C. 160(e)	5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unreported. The decision and order of the National Labor Relations Board (Pet. App. A72-A94) is reported at 285 N.L.R.B. No. 21. The decision of the administrative law judge (Pet. App. A5-A67) is unreported.

JURISDICTION

The judgment of the court was entered on November 21, 1988. The petition for a writ of certiorari was filed on February 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates four supermarkets and a produce warehouse in the Toledo, Ohio, area (Pet. App. A7). In January 1980, Locals 954 and 626 of the United Food

and Commercial Workers International Union began organizing the employees at those facilities (*id.* at A7). All five of the employees at the warehouse, who constituted a separate bargaining unit, signed authorization cards by February 4, and two of the warehouse employees distributed handbills at petitioner's Central Avenue store on February 19 (*id.* at A85). On learning of the handbilling, petitioner's supervisor in charge of the warehouse called a meeting of warehouse employees. He asked them what their problems were and told them they were "a family" that could solve any problems without intervention from a third party (*id.* at A37, A85). He also told the warehouse employees that he was "disappointed" by their support of the Union, and stated that if the Union came in he would close the warehouse and that the employees would be out of jobs and ineligible for unemployment compensation (*id.* at A85).

A second meeting of the warehouse employees was held a few days later, with petitioner's executive senior vice-president and director of operations in attendance. At that meeting, Charles Tucker complained about his part-time status and consequent ineligibility for health insurance and other benefits, and another employee complained about the lack of a regularly scheduled lunch hour. Shortly thereafter, a new work schedule was posted with a regularly scheduled lunch hour, and Tucker was classified as a full-time employee.

On March 10, the Union requested recognition based on its card majority. Petitioner declined to extend recognition, and insisted on an election. On March 26, Richard Doll, a known union activist who had participated in handbilling, was discharged. Pet. App. A7-A8, A48, A86. The Union filed charges of unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (5), with re-

spect to the warehouse employees and with respect to the employees at three of petitioner's stores whom the Union sought to represent in separate bargaining units (Pet. App. A5 n.1, A6 n.3).[1]

2. In August 1981, an administrative law judge (ALJ) found that, by its threats, solicitation and satisfaction of grievances, and the discriminatory discharge of Doll, petitioner had committed serious violations of Section 8(a)(1) and (3) with respect to its warehouse employees, and had violated Section 8(a)(5) by its refusal to recognize and negotiate with the Union as their representative (Pet. App. A37, A38, A48, A58-A60). The ALJ further found that petitioner had engaged in additional unfair labor practices affecting employees system-wide, and in unfair labor practices affecting employees at individual stores (*id.* at A37-A56), including the discriminatory discharge of another union sympathizer (*id.* at A55-A56).

The ALJ recommended the issuance of a broad cease and desist order and reinstatement of the discharged employees with back pay (Pet. App. A62). With respect to the warehouse bargaining unit, the ALJ recommended that petitioner be directed to bargain with the Union as the representative of the warehouse employees, pursuant to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), which authorized the issuance of bargaining orders "in cases where an employer's unfair labor practices are so serious that a fair and free election cannot be held" (Pet. App. A59).

3. The National Labor Relations Board (Board) issued its decision in July 1987. With respect to the warehouse employees, the Board adopted the ALJ's recommendation

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[1] Elections were scheduled in all four of the units, but were blocked pending disposition of the unfair labor practice charges (Pet. App. A6 n.3).

that it issue a bargaining order (Pet. App. A84-A87).[2] The Board emphasized "the seriousness of these violations" (*id.* at A86). It explained: "In the course of 5 weeks, the warehouse employees were threatened with plant closure, had their grievances solicited and remedied by top management, and saw one of their co[-]workers discharged for his union activity. These actions involve the type of pervasive coercion which has lingering effects not readily dispelled. Because of the swiftness and severity of [petitioner's] reaction against the Union's organizing drive, it is highly unlikely that a fair election could be conducted with the use of only traditional remedies." *Ibid.*

The Board further stated: "We are mindful that 7 years have passed since the occurrence of the unlawful conduct in the warehouse unit. The serious nature of [petitioner's] conduct in threatening plant closure, soliciting grievances, and discharging a union supporter, however, convinces us that the lasting effects of such conduct cannot be remedied either by the passage of time or the Board's traditional remedies. The passage of time, though regrettable, is not a sufficient basis for denying the bargaining order." Pet. App. A87, citing *Quality Aluminum Products,* 278 N.L.R.B. No. 49 (Jan. 31, 1986), enforced, 813 F.2d 795 (6th Cir. 1987).

4. In December 1987, petitioner filed a motion for reconsideration of the Board's order and reopening of the record "in light of the passage of time * * * and the substantial employee turnover * * * in the warehouse bargaining unit" (Pet. App. A100). A supporting affidavit stated

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[2] The Board disagreed with several of the ALJ's findings that petitioner had violated Sections 8(a)(1) and (3) by actions affecting store employees, and by the institution of a new health care program in March 1980 (Pet. App. A73-A84). It otherwise adopted his findings, conclusions, and recommended order (*id.* at A72-A73).

that, as of December 12, 1987, only one of the five current warehouse employees had been employed in 1980 (Pet. App. 103). The Board's Deputy Executive Secretary informed petitioner by letter[3] that, since the motion had been filed more than four months after the Board issued its decision, the motion was untimely under Section 102.48(d)(2) of the Board's rules, which requires such motions to be filed within four weeks. Accordingly, the letter stated that the motion would not be forwarded to the Board for consideration. In addition, the letter noted that the motion had been submitted after the Board had petitioned for enforcement and the record of the case had been filed in the court of appeals, thus depriving the Board of jurisdiction to modify or set aside its order. See 29 U.S.C. 160(d).

In April 1988, while the case was pending before the court of appeals, petitioner addressed another motion for reconsideration to the Board, stating that it no longer employed any of the warehouse employees it employed in 1980 (Pet. App. A105). In August 1988, after briefing had been completed, petitioner applied to the court of appeals for leave, pursuant to Section 10(e) of the Act, 29 U.S.C. 160(e), to adduce evidence before the Board that, as of March 1988, it no longer employed any of the employees affected by the 1980 unfair labor practices.[4] As the reason for its failure to adduce such evidence before the Board,

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[3] The letter is reproduced in the appendix to this brief.

[4] Section 10(e) provides, in pertinent part: "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record."

petitioner stated that the "passage of excessive time is continuing and the complete turnover of the employee compliment [*sic*] occurred only as of March, 1988" (Pet. App. A97).

5. The court of appeals took no action on petitioner's motion, but denied it, sub silentio, in its decision affirming the Board's order (Pet. App. A1-A2). The court concluded that the Board was correct in finding violations of Section 8(a)(1), (3), and (5) of the Act. It added that, "[e]ven though there had been a seven year delay on the part of the Board between the time of the violations and its decision, the Board was entitled to find that the taint of the serious illegal acts of the employer may still linger at the company's produce warehouse, the place where the union activity began. *See, e.g., NLRB* v. *Katz,* 369 U.S. 736, 748 n.16 (1962)." Pet. App. A2.

Judge Norris dissented. Citing *Clark's Gamble Corp.* v. *NLRB,* 422 F.2d 845 (6th Cir.), cert. denied, 400 U.S. 868 (1970), and noting that "the negative effects of outrageous conduct" might dissipate as the result of the passage of time, he asserted that the Board had abused its discretion when it concluded that a bargaining order was required "without having conducted any factual inquiry as to whether conditions" still warranted that remedy (Pet. App. A2).

Petitioner's motion for rehearing was denied, with no judge requesting a vote on petitioner's suggestion of rehearing en banc (Pet. App. A95).

ARGUMENT

The decision of the court of appeals involves the application of settled principles to the facts of this case, and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court held that the Board may issue bargaining orders even where the unfair labor practices were not "outrageous" and "pervasive," where the unlawful conduct "nonetheless * * * ha[d] the tendency to undermine majority strength and impede the election processes" (*id.* at 613-614). In that situation, a bargaining order may issue "where there is * * * a showing that at one point the union had a majority" and "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order" (*id.* at 614-615).

The Board found that the Union had a clear card majority (Pet. App. A84) and that petitioner's unfair labor practices, which it termed "hallmark" violations (*id.* at A87), "involve[d] the type of pervasive coercion which has lingering effects not readily dispelled" (*id.* at A86). The Board concluded, and the court agreed, that in light of "[t]he serious nature of [petitioner's] conduct in threatening plant closure, soliciting grievances, and discharging a union supporter, * * * the lasting effects of such conduct cannot be remedied either by the passage of time or the Board's traditional remedies," and that the "passage of time, though regrettable, is not a sufficient basis for denying the bargaining order" (*id.* at A87). Accordingly, the decision below is fully consistent with *Gissel*.

2. Nor is review warranted on account of a conflict in the circuits. *NLRB* v. *Koenig Iron Works, Inc.*, 856 F.2d 1 (2d Cir. 1988) (Pet. 7-9), involved circumstances much different from those at issue here. The employers in that case had voluntarily recognized a Shopmen's local and entered into collective bargaining agreements with it, the last of

which expired in 1975. The employers then recognized a Teamsters local, but the Board ordered them to bargain with the Shopmen's local. The employers did so from 1982 to 1984, but, during the bargaining, granted unilateral wage increases that were held to be unfair labor practices. Bargaining resumed, but terminated in 1985. The court held that the employers there, which "had a considerable basis for doubting the current majority status" of the union (856 F.2d at 3), could force an election. Unlike the present case, the question whether serious misconduct would prevent a fair election was not at issue in *Koenig*. The issue there was whether the passage of time contributed to a legitimate doubt of continuing majority status of a previously recognized union.

The facts in *Impact Industries, Inc.* v. *NLRB*, 847 F.2d 379 (7th Cir. 1988) (Pet. 9-10), are also significantly different from those presented here. The Board there failed to consider evidence, timely proffered by the employer, that there had been an 87% turnover in its workforce since the time of its unfair labor practices and that its co-owners at that time had subsequently died (847 F.2d at 383). The court of appeals remanded for the Board to consider that evidence. Here, in contrast, there has been no change in ownership. That is plainly a critical factor in determining whether prior serious unfair labor actions would taint an election, since employees would not necessarily believe that a new owner would take the sort of actions taken or threatened by a prior owner. In addition, petitioner, unlike Impact Industries, did not make its proffer in timely fashion. Finally, petitioner has alleged only that there was a substantial turnover in the warehouse workforce *after* the Board issued its bargaining order. It has not alleged that there had been substantial turnover at the time the order was issued.[5]

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[5] Cf. *NLRB* v. *Marion Rohr Corp.*, 714 F.2d 228, 231 (2d Cir. 1983) (Pet. 8 n.5) (need for bargaining order must be assessed as of

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOSEPH E. DESIO
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RANDALL FRYE
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APRIL 1989

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the time it is issued); *NLRB* v. *Pace Oldsmobile, Inc.*, 739 F.2d 108, 110 (2d Cir. 1984) (Pet. 8 n.5) (same). The Sixth Circuit in *Clark's Gamble Corp.* v. *NLRB*, 422 F.2d 845, cert. denied, 400 U.S. 868 (1970), relied on by the dissenting judge here (Pet. App. A2), did not suggest that the Board must consider turnover at the time of its decision in the absence of a timely allegation that such turnover has occurred. And the Sixth Circuit subsequently has held that "[t]he Board need not consider events occurring after the issuance of a bargaining order. To do so would put a premium upon continued litigation by an employer." *Automated Business Systems* v. *NLRB*, 497 F.2d 262 (1974) (citations omitted).

APPENDIX

[SEAL] NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

December 21, 1987

Re: Churchill's Supermarket, Inc.
Case No. 8-CA-13944-1 et al.

Terrance L. Ryan, Esq.
Marshall & Melhorn
Four SeaGate
Eighth Floor
Toledo, Ohio 43604

Dear Mr. Ryan:

We are in receipt of your moiton [*sic*] for reconsideration on behalf of the Respondent in the above captioned case.

Consistent with the provisions of Section 102.48(d)(2) of the Board's Rules and Regulations, the due date for receipt of your Motion for Reconsideration in this case was 28 August 1987. As your document was dated 14 December 1987, it was untimely submitted and thus will not be forwarded to the Board for consideration. In addition, under Section 10(d) of the Act, the Board may not modify or set aside its order ". . . after a record in a case shall have been filed in a court . . ." Because a petition for enforcement has been filed and the record has been filed with the court, the Board lacks jurisdiction to modify or set aside its order.

In accord with the above, all copies of your motion for reconsideration are returned herewith, with the exception of one copy, which will be retained for the Board's informal case file.

Sincerely,

/s/ JOSEPH E. MOORE

Joseph E. Moore
Deputy Executive Secretary

cc: NLRB-Region 8
Merritt W. Green, III, Esq.

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